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Supreme Court, U.S.
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Case No.

IN THE SUPREME COURT OF THE UNITED STATES

WALE O. OSIJO,
Petitioner,
vs.,
MARK A WEINER; PENNY CHILDERS; BARBARA SALISBURY; RISK ENTERPRISE MANAGEMENT LTD.; DAVID RAYMOND PINELLI; GEORGIA A. MICHELL; JOHN FRANK GANONG; SUZANNE N. BOUCHER; JAMES A. MURPHY; ANTOINETTE W. FARRELL; and JUDITH SANDERS,
Respondents.

On Petition For Writ Of Certiorari
To The
United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the *Fourth Amendment* protects a client's legitimate expectation of privacy in his or her legal and medical files in the hands of a former attorney who is not an object of income tax investigation.

2. Whether the *Fifth Amendment* prevents the Government from obtaining a client's legal and medical files from a former attorney who was being disciplined and probated by the State Bar, and search the contents thereof for possible evidences of income tax violation, without the due process.

3. Whether *28 U.S.C. 2679(b)(2)* forbids the substitution of United States in place of its employees for allegations of Constitutional violation.

4. Whether *Article III, Section 2* of the U.S. *Constitution* and 28 U.S.C. 1332(a)(1) obliges the exercise a "virtually unflagging" jurisdiction to order disgorgement of an adjudicated client's misappropriated moneys by attorneys.

5. Whether amendment of the complaint should be freely granted to allege newly discovered facts and evidences.

PARTIES IN THE NINTH CIRCUIT PROCEEDING

1. Petitioner, Wale O. Osijo, a tax accountant, was the Appellant. He was domiciled in Clark County, Nevada, as of the time the case was filed in Los Angeles, California.

2. Respondent, Mark A. Weiner, an attorney at law, in the employ of the District Counsel's Office of the Internal Revenue Service (IRS), Thousand Oaks, California, was an Appellee. Petitioner does not know if he is still employed by the IRS.

3. Respondent, Penny Childers, a supervisor, in the employ of the IRS in Fresno, California, was an Appellee. She is still in the employ of the IRS in Fresno, California.

4. Respondent, Barbara Salisbury, an income tax examiner, in the employ of the IRS, was an Appellee. Petitioner does not know if she is still employed by the IRS.

5. Respondent, Risk Enterprises Ltd., the manager of risks and liabilities for and of The Home Insurance Companies in the State of California, was an appellee. The Home

Insurance Companies is currently under an Order of Supervision in the State of New Hampshire. Risk Enterprise Management, Ltd., is a corporation duly licensed in the State of Delaware.

6. Respondent, David Raymond Pinelli, an attorney at law, and a partner in the law firm of Burnham & Brown, in Oakland, California, was an Appellee. Petitioner does not know if he is dead or alive. There are rumors that he is dead.

7. Respondent, Georgia A. Michell, an active attorney at law, and the principal partner in the partnership law firm of Ganong & Michell, in Walnut Creek, California, was an Appellee.

8. Respondent, John Frank Ganong, an inactive attorney at law, and a partner in the partnership law firm of Ganong & Michell, in Walnut Creek, California, was an Appellee.

9. Respondent, Suzanne N. Boucher, a former associate in the law firm of Ganong & Michell, in Walnut Creek, California, was an Appellee.

10. Respondent, James A. Murphy, an attorney at law, and the principal partner in the law firm of Murphy, Pearson, Bradley & Feeney, in San Francisco, California, was an Appellee.

11. Respondent, Antoinette W. Farrell, a former associate in the law firm of Murphy, Pearson, Bradley & Feeney, in San Francisco, California, was an Appellee. Petitioner does not know if she still active in the State of California, or in any other jurisdiction in the United States.

12. Respondent, Judith Sanders, the Discovery Referee in the Superior Court of Contra Costa County, California, was an Appellee.

13. The United States was an Appellee. It was substituted in place of its employees by the District Court, pursuant to *28 U.S.C. 2679(b)(1)* and *28 U.S.C. 2679(d)(1)*.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Wale O. Osijo, (Mr. Osijo), respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, filed in this proceeding on July 28, 2000.

OPINIONS BELOW

The Memorandum of Decision of the Ninth Circuit, dated July 28, 2000, affirming the decision of the District Court appears in the Appendix (App. 6). The Minute Order of the District Court denying Motion for Rehearing and Motion to Amend, dated March 25, 1999, appears in the Appendix (App. 9). The Minute Order of the District Court dated June 29, 1998, substituting United States in place of its employees appears in the Appendix (App. 13). The adopted Revised Report and Recommendations, dated March 26, 1999, appears in the Appendix (App. 30). Finally, the Westfall Act Determination of Course and Scope of Employment for

Barbara Salisbury, Penny Childers, and Mark Weiner appear in the Appendix (App. 77). The published opinion of the United States Tax Court, titled: *Osijo v Commissioner of Internal Revenue*, dated January 28, 1998, appears in the appendix (App. 81). The unpublished opinion of the California Court of Appeals, First District, Division Five, titled: *Osijo v Ganong & Michell et al*, dated April 12, 1996, appears in the appendix (App. 97).

CONSTITUTIONAL & STATUTORY PROVISIONS

(1) *Article III, Section 2*, of the Constitution of the United States; (2) *Fourth Amendment* to the Constitution of the United States; (3) *Fifth Amendment* to the Constitution of the United States; (4) *28 U.S.C. 1332(a)(1)*; (5) *28 U.S.C. 2679(b)(2)*; (6) *42 U.S.C. 2000aa-11(a)(3)*; (7) *28 C.F.R. 59.1(b)*; (8) *Federal Rules of Civil Procedure, Rule 15a*; (9) *Federal Rules of Civil Procedure, Rule 60(b)(3)*; (10) *Federal Rules of Civil Procedure, Rule 69(a)*; (11) *Federal Rules of Evidence, Rule 501*;

(12) *California Business Professions Code, Section 6068(d, e, & l);* (13) *California Code of Civil Procedure, Section 187;* (14) *California Rules of Professional Conduct, Rule 3-310(f)(2);* (15) *26 U.S.C. 7602(c)(1).*

JURISDICTIONAL STATEMENT

1. This Petition for Writ of Certiorari to the United States Court of Appeals is timely filed in accordance with *28 U.S.C. 1254(1).* The judgment for reviewed was entered on 7-28-00.

2. A Petition, with Suggestion for Rehearing En Banc was timely filed on September 11, 2000. No decision was made.

3. No Cross-Petition is filed in this proceeding.

4. *28 U.S.C. 1254(1)* confers jurisdiction for review by Writ.

STATEMENT OF THE CASE

1. **Bases of Original Jurisdiction:** The original jurisdiction for violation of privacy, *Fourth* and *Fifth Amendment* rights are based on *28 U.S.C. 1331.* The original

jurisdiction on the causes of action for fraud and malicious prosecution against the non government parties and the Discovery Referee is based on *28 U.S.C. 1332(a)(1)*. (App. 14)

2. **Procedural Status:** This case originated in the United States District Court for the Central District of California, against all the Defendants listed on page *iii*, with the exception of United States. Subsequent to the filing of the Scope of Employment Certification by the Attorney General designate, (App. 77), the Government motioned for dismissal of action with prejudice for lack of subject matter jurisdiction because of its sovereign immunity. The motion was granted with leave to amend, and the action to proceed under *26 U.S.C. 6103* and *7431*. (App.13)

In the course of discovery, Mr. Osijo found out that the Government had conspired to obtain his entire legal and medical files, from Respondent Georgia A. Michell (Ms. Michell), his former attorney, without his knowledge or consent, or an administrative summons, and had rummaged

through the files, for possible evidence of income tax violation (App. 10, footnote) to use in the Tax Court, in a case titled: *Osijo v Commissioner of Internal Revenue*, U.S.T.C. 1998-38. (App. 81).

Thereafter, the Government quickly moved for summary judgment in order to close the case on the unauthorized disclosure of tax or tax return information. In his Opposition, and in his Motion for Rehearing of Summary Judgment, Mr. Osijo expressed his desire to amend the complaint pursuant to *Rule 15a*. (App. 12 footnote) The Motion for Rehearing and Motion to Amend were denied on the grounds " ... that the government's investigation into plaintiff's tax returns was authorized by the Internal Revenue Code," and that "the government has stated that 'the U.S. Attorney's office has shredded the medical records identified by Mr. Osijo... In addition, the government states that the U.S. Attorney's office has requested all similar records from the IRS files and will shred these documents

upon receipt." This rendered the issue moot. (App. 10).

The Magistrate Judge followed with a Revised Report and Recommendation for the dismissal of the entire action with prejudice, based mostly on the summary judgment and ostensibly that the complaint did not establish a diversity jurisdiction because the causes of action were intertwined with an action that is pending in a California court against one of the Defendants. (App. 68) A motion to order disgorgement of an adjudicated misappropriated fund by attorneys was recommended for denial, on the ground that the *Rooker-Feldman doctrine* deprived the District Court of subject matter jurisdiction to enforce or amend the judgment of California Courts against the Defendants. (App.69 & 70). Finally, a motion to amend the complaint was also recommended for denial on the ground that the proposed amendment did not specify the legal and medical records, and named the person who turned over the records to whom, so that they can have enough information with

which to defend themselves, including privileges. (App. 67).

These decisions were timely appealed to the Ninth Circuit, which affirmed, unadorned "the magistrate judge's revised report and recommendation filed on March 3, 1999, and adopted by the district court in its order filed on March 26, 1999 ... the district court did not abuse its discretion when it denied Osijo's March 9, 1999 Fed. R. Civ. P. 59(e) motion." The last sentence reads: " Finally, we reject Osijo's contention that the United States violated his Fourth Amendment rights when it obtained and possessed his legal and medical records." (App. 8)

A Petition with Suggestion for Rehearing En Banc was timely filed on September 11, 2000, which invited the Appellate Court's attention to the facts it omitted the review of two material judgments, namely: the Order substituting United States in place of its employees (App. 13), and, the Order that denied motion to amend. (App. 9). That the decision conflicts with the opinions of the Supreme Court

and other Circuits on the substitution of United States in place of its employees for constitutional violations. The decision affirming, unadorned, the adopted Revised Report and Recommendations conflicts with the opinions of the Supreme Court and other Circuits in respect of motion to amend. Finally, the decision affirming the denial of motion to order disgorgement of adjudicated misappropriated client's funds conflicts with the opinions of Supreme Court and the California Supreme Court. The Appellate Court made no decision.

3. **Statement of Facts: A.** Respondent Georgia A. Michell (Ms. Michell) conspired to turnover copies Mr. Osijo's legal and medical files in her possession to Respondents Mark A. Weiner (Mr. Weiner); Penny Childers (Ms. Childers) and Barbara Salisbury (Ms. Salisbury), and other unknown employees of the IRS, to search for possible evidence of income tax violation, without his knowledge or consent, or an administrative summons. (App. 10)

As of the time that Ms. Michell turned over copies of these files to the Government, she was being disciplined and probated by the *State Bar of California* for the same offense of turning over his confidences to Respondent David Raymond Pinelli (Mr. Pinelli) and the Home Insurance Companies (the Home Insurance), and for taking positions that she knew were inimical to Mr. Osijo's interests. (App. 15, 35, 125).

The legal file contained all confidences that Mr. Osijo reposed in Ms. Michell as his attorney. The medical file contained his psychiatry, psychological, neurological and orthopedic evaluations; a family physician's medical evaluation; the medical records from the Alameda County General Hospital, Oakland, California, which contained: x-rays, bags of blood bile and type, all medications both narcotic and non narcotic, etc., etc. The Government still has copies of these files. (App. 11)

B. Prior to conspiring to turnover the legal and medical files to the Government, Ms. Michell had conspired to

represent Mr. Osijo in the aforementioned personal injury action in the Superior Court of Alameda County, California, titled: *Osijo v Housing Resources Management, Inc., et al,* against Mr. Pinelli, whose law firm (Burnham and Brown), was her attorney for legal malpractice; and the Home Insurance, which carried the liability for her malpractice of the same personal injury action, without his knowledge or consent. (App. 101) The Home Insurance had hired Mr. Pinelli's law firm to represent Ms. Michell in an unrelated legal malpractice action, barely six months before she became Mr. Osijo's attorney in the said personal injury case. (App. 34)

Ms. Michell conspired with Mr. Pinelli and the Home Insurance to settle the case for $250,000, by arranging to take the case to the Judicial Arbitration and Mediation Services in San Francisco, California. They paid the Hon. Victor Mario Campilongo, a retired judge from the Superior Court of San Francisco, California, to convince Mr. Osijo that his case was

worth no more than $75,000, and it was God sent and very generous of the Home Insurance to offer $250,000 to settle the case. The Home Insurance financed the conference. By ruse, they got Mr. Osijo to sign a "Settlement Agreement" that they had conspired to prepare with Ms. Michell. The following day of July 26, 1991, and at all times thereafter, Mr. Osijo informed Ms. Michell that he wished to disavow the "Settlement Agreement." Ms. Michell simply ignored his wishes and conspired with Mr. Pinelli and the Home Insurance to settle the case for $250,000 without his knowledge or consent. On July 26, 1991, the Home Insurance issued a check for $250,000 into the "Trust Account of Ganong & Michell As Trustees for Wale O. Osijo." (App. 87). Ms. Michell instantly cashed the check without Mr. Osijo's knowledge or consent, and over a period of two years, misappropriated a total of $127,500 for her own use and purposes, again, without his knowledge or consent. (App. 34, 88, 119).

Meanwhile, Ms. Michell and Mr. Pinelli conspired to motion the Superior Court to enforce the "Settlement Agreement" as the final judgment in the action. (App. 50) All efforts to reverse the enforcement order on appeal failed. (App. 102).

C. Thereafter, Mr. Osijo, pro se, sued Ms. Michell, her law firm and her partner Respondent John Frank Ganong (Mr. Ganong), in the Superior Court of Contra Costa County, California, in an action titled: *Osijo v Ganong & Michell, et al* Case No. C92-05352, for (i) Breach of Fiduciary Duties; (ii) Conflict of Interest; and (iii) Misappropriation of funds. Ms. Michell turned over the defense of the case to the Home Insurance, who in turn, hired Respondents James A. Murphy (Mr. Murphy) and Antoinette W. Farrell (Ms. Farrell) to defend the case. (App. 42, 50, 115). In order to conceal the involvement of the Home Insurance in the subsequent action, Ms. Michell hired Respondent Suzanne N. Boucher (Ms. Boucher) to sign all pleading and appear in

the California Court on her behalf, while Mr. Murphy, Ms. Farrell and the Home Insurance hide in the background.

Finally, in an attempt to discourage Mr. Osijo from the lawsuit, they filed a sham cross complaint for malicious prosecution of the same action, in the same action. (App. 121). Respondent Judith Sanders (Ms. Sanders) was used to transfer the case from one judge to another in search of a lenient judge. From a pool of eighteen judges, twelve participated in the case, with each judge recusing himself or herself, one after the other. (App. 52)

In short, after hiring Mr. Pinelli to defend the underlying personal injury action, the Home Insurance hired Mr. Murphy and Ms. Farrell to defend the subsequent legal malpractice action, and they concealed the involvement of the Home Insurance from Mr. Osijo and the Courts. (App. 50, 115-footnote). Mr. Osijo's adjudicated misappropriated moneys remained with them, up till today, since 1991. (App. 119).

REASONS FOR GRANTING THE WRIT

THE FOURTH AMENDMENT PROTECTION

The Ninth Circuit's decision that "We reject Osijo's contention that United States violated his Fourth Amendment rights when it obtained and possessed his legal and medical records," (App. 8), directly conflicts with the holdings of the Supreme Court in *Rakas v Illinois*, 439 U.S. 128; 99 S.Ct 421; 58 L.Ed.2d 387 (1978), that the "Legitimation of expectation of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to the understandings that are recognized and permitted by the society."

The Supreme Court further held in *Upjohn Co. v United States*, 449 U.S. 383, 389; 101 S.Ct. 677, 682; 66 L.Ed.2d 584 (1981) that the clients of an attorney have such source of legitimate expectation of privacy in federal and state statutes, in the codes of professional responsibility, under

the common law, and in the United States Constitution.

The adopted Revised Report and Recommendation stated in relevant part in Appendix 67 that "Although it is not clear that Plaintiff intended to state a claim under the state law for disclosure of his legal and medical records, the Court finds that Plaintiff has failed to state such a claim." The Appellate Court affirmed unadorned.

But the Third Circuit held in *Klitzman, Klitzman & Gallagher v Krut*, 774 F.2d. 955, 960-961 (1984); and *United States v Leibman*, 742 F.2d. 807 (1984) that "it is axiomatic that the attorney-client privilege confers upon the *client* an expectation of privacy in his confidential communications with the attorney," pursuant to the federal and state statutes, federal and state common laws and in the Constitution of the United States.

THE DUE PROCESS REQUIREMENTS

The District Court found that the "The government

obtained copies of certain medical records as a result of an Internal Revenue Service ("IRS") investigation into plaintiff's tax returns . . . this Court found that the government's investigation into plaintiff's tax returns was authorized by the Internal Revenue Code." (App. 10 footnote) The Appellate Court did not review this order.

The decision directly conflicts with Supreme Court's holding in *Fisher v United States*, 425 U.S. 391; 96 S.Ct. 1596; 48 L.Ed.2d 39 (1976) that "if documents are unobtainable by summons from the client, they are unobtainable by summons directed to the attorney for reasons of attorney-client privilege." *Id.* at 425 U.S. 405.

In addition, the plain language of *26 U.S.C. 7602(c)(1)* is that "An officer or an employee of the Internal Revenue Service may not contact any other person other than the taxpayer with respect to the determination or collection of the tax liability of such taxpayer without providing reasonable notice in advance to the taxpayer that contact

with persons other than the taxpayer may be made."

In the case at hand, there was simply no administrative summons issued, nor did Mr. Osijo even know that the Government had conspired with Ms. Michell to turn over his legal and medical files to search for possible evidences of income tax violation. All he knew and felt was the wrath of the IRS on him, his family and friends.

Finally, the decision conflicts with the plain languages of *California Business Professions Code, Sections 6068(d & e)*; the *Federal Rules of Evidence, Rule 501; 42 U.S.C. 2000aa-11(a)(3)*; and *28 C.F.R. 59.1(B)*, all meant to protect the legitimate expectation of a client in his legal files in the hands of a third party who is not an object of government investigation.

The Supreme Court held in *United States v Ron Pair Enterprises, Inc.*, 486 U.S. 235; 103 L.Ed.2d 290; 109 S.Ct.1026, (1989) that "In statutory interpretation, the Court looks to the plain language of the statute and gives effect to its meaning. The Court properly assumes, absent sufficient

indication to the contrary, that Congress intends the words in its enactments to carry their ordinary, contemporary, common meaning. If the statute is clear, the Court's inquiry ends."

SUBSTITUTION OF UNITED STATES

The Ninth Circuit's ruling that it rejects Mr. Osijo's contention the United States violated his Fourth Amendment rights when it obtained and possessed his legal and medical files was based on the Course and Scope of Employment Certification filed by the Attorney General designate, which the District Court ruled as conclusive of the facts and circumstances of this case, despite the later discovery of Constitutional violations. (App. 8 & 80)

The decision conflicts with the opinion of the United States Court of Appeals for the First Circuit in *Aversa v United States*, 99 F.3d 1200 (1996), which held that "... certification is provisional and subject to judicial review

after which an employee may be resubstituted."

The decision further conflicts with the opinion of the Supreme Court of the United States in *Carlson v Green*, 446 U.S. 14; 64 L.Ed.2d 15; 100 S.Ct. 1468, which held that the plain language of *28 U.S.C. 2679(b)(2)* forbids the substitution of United States when a federal officer is alleged to have violated the Constitution.

In *Carlson, supra*, 446 U.S. 14, the Appellate Court reasoned that based on the District Court's decision, a prison warden will be encouraged to kill than to injure an inmate because he or she will escape personal liability based on the Illinois law for survivorship.

In the case at hand, based on the District Court's ruling, the employees or officers of the IRS can escape personal liability by obtaining a client's legal and medical files from a former attorney, without the client's knowledge or consent, and pester the client's life, in exchange for the tax returns information in the IRS, under the camouflage of income tax

investigation.

DISGORGEMENT OF MISAPPROPRIATED FUNDS

The adopted Revised Report and Recommendation reads in relevant part that: "The Court finds and concludes that Plaintiff has failed to identify any claim cognizable under state law which are not intertwined with the state court's on going litigation regarding the settlement of his personal injury action. Therefore, Plaintiff has failed to establish diversity jurisdiction. (App. 68) The Appellate Court affirmed, unadorned.

The decision conflicts with the plain languages of *Article III, Section 2,* of the *Constitution,* and *28 U.S.C. 1332(a)(1)* which provided a forum of original jurisdiction for litigating disputes between citizens of different states. The provisions of the statute did not forbid a case in the federal court because of being intertwined with an on going litigation in the state court. Moreover, the parties in this instant action

are not the same parties in the personal injury case and the subsequent legal malpractice action. The causes of actions are not the same, either.

The decision further conflicts with the holdings of the Supreme Court in *Colorado Water Conservation District v United States*, 424 U.S. 800; 96 S.Ct. 1236; 47 L.Ed.2d 483, that the desire for a federal forum is assured by the *Constitutional* provisions for diversity jurisdiction and the Congressional statute implementing *Article III, Section 2*. The District Court's obligation to exercise jurisdiction is "virtually unflagging."

The adopted Revised Report and Recommendations denied the Motion to Order the Disgorgement of the adjudicated Client's Misappropriated Funds by attorneys, on the ground that the *Rooker-Feldman Doctrine* deprived it of the subject matter jurisdiction, because of an alleged but unspecified action that is pending against all the Defendants in an unspecified California Court. (App. 69) The Appellate

Court affirmed, unadorned.

The decision conflicts with the opinion of the United States Court of Appeals for the Seventh Circuit in *Long v Shorebank Development Corporation*, 182 F.3d 548 (1999), which ruled that an action that was pending in the Illinois court did not deprive the District Court of subject matter jurisdiction because the action in the federal court was not seeking a review of the state court judgment. In addition, the federal court case alleged that the underlying Illinois Court judgment was fraudulently obtained by the defendants, which pursuant to the Illinois law, is void

The decision further conflicts with the opinion of the Supreme Court in *Peacock v Thomas*, 516 U.S. 349, 359 n.7; 133 L.Ed.2d 817; 116 S.Ct 862 (1996), which held that the *Federal Rules of Civil Procedure, Rule 69a* "permits the judgment creditors to use any execution method consistent with the practice and procedure of the state in which the District Court sits."

California Code of Civil Procedure, Section 187 expressly grants jurisdiction to the District Court not only to enforce its judgments but to amend it. To amend a judgment under *Section 187*, two requirements must be met: "(1) that the new party be the alter ego of the old party and (2) that the new party had controlled the litigation, thereby having had the opportunity to litigate, in order to satisfy the due process concern." *Tripplet v Farmers Insurance Exchange*, 24 Cal.App.4th 1415, 1421 (1994).

Finally, the *Federal Rules of Civil Procedure, Rule 60(b)(3)* does not limit the power of a Court to set aside a judgment for fraud upon the Court. *Hadix v Johnson*, 144 F.3d 925, 937 (6th Circuit, 1998). This depends on its source of jurisdiction.

The Home Insurance financed and controlled the defense of the underlying personal injury case and the subsequent legal malpractice action, in violation of *California Business Professions Code, Sections 6068(d & e)*, and Mr. Osijo's rights to the due process of law, to a fair trial guaranteed by the

Fifth Amendment. It paid $250,000 into the "Trust Account of Ganong & Michell, As Trustees For Wale O. Osijo," without Mr. Osijo's knowledge or consent, which enabled Ms. Michell misappropriates $127,500, again without his knowledge or consent in violation of *California Business Professions Code, Section 6101*.

It is an adjudicated fact that Ms. Michell misappropriated Mr. Osijo's moneys in her trust. (App. 119). Ms. Michell testified under Oath that she had returned the moneys to the Home Insurance. So how does Mr. Osijo recover his moneys, from either or both of them? The Home Insurance, Ms. Michell and her cronies had to be sued in the District Court in Los Angeles, California, all the way from Las Vegas, Nevada. Now the District Court claimed to have no jurisdiction because the cause is intertwined with an on going litigation that has to do with the settlement of Mr. Osijo's personal injury case. No one else can be sued except Ms. Michell, despite the facts and evidences of conspiracy?

The decision further conflicts with the opinion of the Supreme Court in *Hazel-Atlas Glass Company v Hartford-Empire Company* 322 U.S. 238, 244 (1944), which held that "the public welfare demands that the agencies of public justice not be so impotent that they must always be mute and helpless victims of deception and fraud."

The Supreme Court further held in *Chambers v NASCO, Inc.*, 501 U.S. 32, 43 (1991), that the inherent power of federal courts includes, inter alia, the power to vacate judgments on proof that a fraud upon the Court has been committed. The "historic power of equity to set aside fraudulently begotten judgments" on the basis that "tampering with the administration of justice in this manner involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public."

Just as a Court may use its inherent power to protect its integrity, by vacating a judgment obtained by fraud, it also may amend for the same purpose.

In all cases involving misappropriation of clients funds, the California Supreme Court and the Supreme Court of the United States not only suspend or disbar the attorney, they have always ordered the disgorgement of the client's funds at 10 percent interest rate, compounded per annum, with proof of restitution to the satisfaction of the Courts filed within the ninety days. The client is never left to chase the attorney all over the country to recover his moneys.

Yet, in the case at hand, Mr. Osijo is left to chase Ms. Michell and her cronies all the way to the United States Supreme Court, in order to recover his moneys. This is unjust and unfair. It is the responsibility of the Court to protect the client from its unscrupulous officers, as held by the First Circuit in *Pearson v First N. H Mortgage Corporation et al* 200 F.3d. 30 (1999).

AMENDMENT OF COMPLAINT

The District Court ruled that "Plaintiff also appears to seek leave to file an amended complaint in order to include

allegations against IRS employees for violating his privacy... to the extent that Plaintiff's motion seeks leave to file an amended complaint, the motion is also denied." (App. 8) The Appellate Court did not review this judgment.

However, the Appellate Court affirmed, unadorned, the adopted Revised Report and Recommendations, which reads in relevant part that: " Plaintiff has also indicated in his objection that he wishes to amend the First Amended Complaint in an attempt to state claims for violation of the 4th and 14th Amendments based on the disclosure of his legal and medical records..he did not allege the nature or the source of record which were allegedly disclosed, does not provide the Defendants with sufficient details from which they could defend such claims, including the assertion of privileges and authorization defenses, and does not allege what information was disclosed to whom or when.." (App. 69).

The decision conflicts with the opinion of the United

States Court of Appeals for the Sixth Circuit which held in *Tefft v Seward*, 689 F.2d 637 (1982), that "the trust of *Rule 15* is to reinforce the principle that cases should be tried on their merits rather than the technicalities of pleading. *Conley v Gibson*, 355 U.S. 41, 48; 2 L.Ed.2d 80; 78 S.Ct 99 (1957); see *3 Moore's Federal Practice, paragraph 15.02[1] (1982) at p. 15-13.* That principle provides guidance for the appellate court charged with determining whether a trial judge has abused his or her discretion in denying a requested amendment. *Foreman v Davis*, 371 U.S. 178, 182; 9 L.Ed.2d 222; 83 S.Ct. 227 (1962) and is especially important where as here, denial of amendment has resulted in dismissal of action."

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

WALE O. OSIJO, MBA.
PETITIONER PRO SE.
3071 EAST LOS ALTOS AVE
FRESNO, CA. 93710-4968
TELEPHONE: (559) 323-9933

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. *U.S. Constitution, Article III, Section 2*: "The judicial Power shall extend in all Cases, in Law and Equity, arising ...;-between Citizens of different States ..."

2. *Fourth Amendment to the United States Constitution*: "The right of the people to be secured in their persons, houses, papers and effects, against unreasonable search and seizures, shall not be violated..."

3. *Fifth Amendment to the United States Constitution*: "No person shall be ....deprived of life, liberty or property without the due process of law..."

4. *28 U.S.C. 1332(a)(1)*: "The District Court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000... and is between (1) Citizens of different states."

5. *28 U.S.C. 2679(b)(2)*: "Paragraph (1) does not extend or apply to a civil action against an employee of the Government-(A) which is brought for violation of the

Constitution of the United States."

6. *42 U.S.C. 2000aa-11(a)(3)*: The Attorney General must recognize special concern for the privacy interests in cases in which a search or seizure for such document could intrude upon a known confidential relationship such as that which may exist between...lawyer and client."

7. *28 C.F.R. 59.1(b)*: It is the responsibility of federal officers and employees to recognize the importance of these personal privacy interests, and to protect against unnecessary intrusion. Generally, when documentary materials are held by a disinterested third party, a subpoena, administrative summons, or governmental request will be an effective alternative to the use of search warrant and will be considerably less intrusive..."

8. *Federal Rules of Civil Procedure, Rule 15a*: "...A party may amend the party's pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires..."

Appendix 3

9. *Federal Rules of Civil Procedure, Rule 60(b)(3)*: "Relief from Judgment or Order" based on "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of the adverse party ... This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding..."

10. *Federal Rules of Civil Procedure, Rule 69(a)*: "...The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held..."

11. *Federal Rules of Evidence, Rule 501*: "..., in civil actions and proceedings, with respect to an element of a claim or defense as to which the State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision therefore shall be determined in accordance with State law."

12. *California Business Professions Code, Section 6068(d), (e) & (l)*: "It is the duty of an attorney to do all of the following:

(d) To employ, for the purpose of maintaining the causes confided in him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact and law.

(e) To maintain the confidences, and at every peril to himself or herself to preserve the secrets of his or her client.

(l) To keep all agreements made in lieu of discipline with the agency charged with attorney discipline."

13. *California Code of Civil Procedure, Section 187*: When jurisdiction is by the constitution or this code, or by other statute, conferred on a court or judicial officer, all means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or statute, and suitable process or mode of proceeding may be adopted

which appear most conformable with the spirit of this code.

14. *California Rules of Professional Conduct, Rule 3-310(f)(2)*: "A member shall not accept compensation for representing a client from one other than the client unless information relating to the representation of the client is protected as required by the Business and Professions Code, Section 6068, subdivision (e)."

15. *26 U.S.C. 7602(c)(1)*: Notice of Contact of Third Parties: General Notice. An officer or employee of the Internal Revenue Service may not contact any person other than the taxpayer with respect to the tax determination or collection of the tax liability of such taxpayer without providing reasonable notice in advance to the taxpayer that contacts with persons other than the taxpayer may be made.

Appendix 6

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 99-55870 **Filed July 28, 2000**

WALE O. OSIJO, Plaintiff-Appellant	* D.C. No. CV-98-1880-CAS
vs.,	* MEMORANDUM[1]
MARK A WEINER; PENNY CHILDERS; BARBARA SALISBURY; RISK ENTERPRISE MANAGEMENT LTD.; DAVID RAYMOND PINELLI; GEORGIA A. MICHELL; JOHN F. GANONG SUZANNE N. BOUCHER; JAMES A. MURPHY; ANTOINETTE W. FARRELL; and JUDITH SANDERS Defendants-Appellees*	*

Appeal from the United States District Court
For the Central District of California
Christina A. Snyder, District Judge, Presiding

Submitted July 17, 2000[2]

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by the 9th Cir. R. 36-3.

[2] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed.R.App.P. 34(a)(2). Accordingly, we deny appellant's request for oral argument.

Appendix 7

Before: KOZINSKI, T.G. NELSON and SILVERMAN, Circuit Judges

Wale Olufemi Osijo appeals pro se the district court's Fed. R. Civ. P. 12(b)(6) dismissal against numerous private party defendants and summary judgment in favor of the United States in his 42 U.S.C. Section 1983 action alleging violations of Fourth and Fourteenth Amendment and improper disclosure of tax information under various federal statutes. We have jurisdiction pursuant to 28 U.S.C. Section 1291.

We review the dismissal de novo, see *Dumas v Kipp*, 90 F.3d. 386, 389 (9th Cir. 1996), and we affirm for the reasons stated in the magistrate judge's revised report and recommendation filed on March 3, 1999 and adopted by the district court in its order filed on March 26, 1999. We review de novo the summary judgment order, see *Margolis v. Ryan*, 104 F.3d 850, 852 (9th Cir. 1998), and we affirm for the reasons stated in the district court's minute order filed on February 24, 1999. Additionally, the district court did not

abuse its discretion when it denied Osijo's March 9, 1999 Fed. R. Civ. P. 59(e) motion. See *School Dist. No. 1J, Multnomath County v. ACandS, Inc.*, 5 F.3d 1255, 1262-63 (9th Cir. 1993). Finally, we reject Osijo's contention that the United States violated his Fourth Amendment rights when it obtained and possessed his legal and medical records.

AFFIRMED.

July 28, 2000

A true copy.

ATTEST: /s/ Cathy A. Catterson

CLERK, U.S. COURT OF APPEALS, NINTH CIRCUIT.

(SEAL)

Appendix 9.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MINUTE ORDER Filed March 25, 1999

Case No.: CV 98-1880 CAS (BQR) March 25, 1999

Title: WALE O. OSIJO v MARK A. WEINER, et al.

PRESIDING: HON. CHRISTINA A. SNYDER, U. S. DISTRICT JUDGE.

Jim Holmes, Deputy Clerk

Carmelita Lee, Court Reporter

PLAINTIFF COUNSEL PRESENT:

DEFENDANT COUNSEL PRESENT:

PROCEEDINGS: PLAINTIFF'S MOTION FOR A REHEARING ON THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

On preliminary review of the motion, the Court finds this matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; Local Rule 7.11. The hearing date of March 29, 1999, is hereby vacated.

The Court entered summary judgment in favor of the United States in this case on February 24, 1999. On March 9,

1999, plaintiff Wale O. Osijo filed the present motion for rehearing on the government's motion for summary judgment. Plaintiff states that during the course of discovery for the government's motion for summary judgment he discovered that the government had copies of his medical files.[1] Plaintiff contends that the government still retains copies of these medical files, and urges that its possession of these files violates plaintiff's right to privacy. In the present motion, plaintiff asks that the Court "adjudicate this issue for or against the Federal Defendants, or allow plaintiff to file a Second Amended Complaint to state these facts for adjudication." Plaintiff's memorandum of Points and Authorities in Support of Motion for a Rehearing on the Government's Motion for Summary Judgment at 3.

The government has stated that "the U.S. Attorney's

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[1] The government obtained copies of certain medical records as a result of an Internal Revenue Service ("IRS") investigation into plaintiff's tax returns. In the order granting summary judgment, this court found that the government's investigation into plaintiff's tax returns was authorized by the Internal Revenue Code.

office has shredded the medical records identified by Mr. Osijo." Government's Opposition to Motion for Rehearing on the Government's Motion for Summary Judgment at 1. In addition the government states that the U.S. Attorney's office has requested all similar records from IRS files, and will shred them upon receipt. Id. at 2. To the extent that plaintiff's motion disputes the government's continued possession of his medical records, the motion is moot and should be denied.

Plaintiff also appears to seek leave to file an amended complaint in order to include allegation against IRS employees for violating his privacy. Plaintiff's motion lacks any basis for this Court to reopen his case against the government. Under the Local Rule 7.16, a motion for reconsideration of the court's decision may be made only on the grounds of:

(a) a material difference in fact or law from that presented to the Court before such decision that in

exercise of reasonable diligence, could not have been known to the party moving for reconsideration at the time of such decision, or

(b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision.

Plaintiff fails to demonstrate that any of these grounds are applicable to the present motion.[2] Therefore, to the extent plaintiff motion seeks leave to file an amended complaint, the motion is also denied.

For the foregoing reasons, plaintiff's motion for rehearing is hereby denied.

ATTEST:

BY: Jim Holmes

DEPUTY

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[2] Plaintiff learned that the government had his medical files prior to the hearing on the motion for summary judgment. Plaintiff also raised this issue in his opposition to the government's motion, and at the hearing before the court on the motion.

Appendix 13

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MINUTE ORDER **Filed July 6, 1998**

Case No.: CV 98-1880 CAS (BQR) June 29, 1998

Title: WALE O. OSIJO v MARK A. WEINER et al

PRESIDING: HONORABLE CHRISTINA A SNYDER
U. S. DISTRICT JUDGE

James Holmes — Deputy Clerk
Carmelita Lee — Court Reporter

PLAINTIFF COUNSEL PRESENT:
Wale O. Osijo, in pro per

DEFENDANT COUNSEL PRESENT:
Edward M. Robbins

PROCEEDINGS: DEFENDANT'S MOTION TO DISMISS COMPLAINT AND ACTION, WITH PREJUDICE

In the present action, plaintiff has sued several Internal Revenue Service employees, an employee and an attorney for The Home Insurance Companies, various attorneys in the law firms of Ganong & Michell and Murphy, Pearson, Bradley & Feeney, and a Superior Court employee for alleged violation of his civil rights. This case is before

Magistrate Judge Robbins for all purposes, except for the instant motion to dismiss which is brought by three defendants who are employed by the United States, Mark A Weiner, Esq., an attorney employed by the Internal Revenue Service and Penny Childers and Barbara Salisbury, both employees of the Internal Revenue Service ("the Federal Defendants"). The federal defendants have not consented to have Magistrate Judge Robbins decide the present motion to dismiss the federal defendants.

Facts Alleged in Complaint

Plaintiff is an African-American tax accountant, residing in Nevada. Most of the actions complained of here occurred in 1991 or 1993-1994.

The first claim for relief asserts violation of 42 U.S.C. Section 1983, based on claims for malicious prosecution. Plaintiff apparently filed a complaint with the State Bar of California against defendant Georgia Michell, an attorney who had represented him in a personal injury case. Plaintiff

asserts that in retaliation for his complaint against Ms. Michell, which resulted in Ms. Michell's being placed on probation for one year, several other attorneys (defendants Boucher, Farrell, Ganong, Michell and Murphy) maliciously caused the Internal Revenue Service to commence an investigation of plaintiff (and possibly some of plaintiff's clients). Displeased with the manner in which defendant Salisbury conducted her investigation, plaintiff alleges he reported her to her supervisor, defendant Childers and to the district manager. After his report to the district manager, plaintiff alleges the supervisor retaliated against him by causing a Secret Service agent to search him and question him and by threatening him with a prison sentence in the event he continued to refuse to file income tax returns for the years being investigated.

Plaintiff's second claim for relief is asserted pursuant to 42 U.S.C. Section 1983 for violation of his privacy rights. The violation of privacy rights allegedly occurred during the

above described event when defendants Weiner, Childers and Salisbury allegedly revealed information contained in plaintiff's Internal Revenue Service file to defendants Michell, Boucher, Farrell, Ganong and Murphy. Furthermore, plaintiff asserts that agent Salisbury utilized information contained in the Internal Revenue Service file as a basis for conducting sham audits of plaintiff's clients, thus violating their privacy rights as well. Plaintiff alleges that these actions caused plaintiff to lose his friends, argue with relatives, and lose many clients.[1]

Standard for a Rule 12(b)(6) Motion

A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint. A court must not dismiss a complaint for failure to state claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which will entitle him to relief."

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[1] The third and fourth claims for relief are apparently asserted agaist persons other than the federal defendants.

Conley v Gibson, 355 U.S. 41, 45-46 (1957); Cahill v Liberty Mutual Ins. Co., 80 F.3d 336, 338 (9th Circuit, 1996).

In a motion pursuant to Fed. R. Civ. P. 12(b)(6), a court must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them. Cahill, 80 F.3d. At 338; NL Industries, Inc v Caplan, 792 F.2d 896, 898 (9th Cir. 1986). The complaint must be read in a light most favorable to the plaintiff. Russell v Landrieu, 621 F.2d 1037, 1039 (9th Cir. 1980). However a court need not accept as true unreasonable inferences on conclusory legal allegations cast in the form of factual allegations. Western Mining Council v Watt, 643 F.2d 618, 624 (9th Cir. 1981), cert. denied, 454 U.S. 1031 (1981). Furthermore, unless a court converts a Rule 12(b)(6) motion into a motion for summary judgment, a court cannot consider material outside of the complaint (e.g. facts presented in briefs, affidavits, or discovery materials). Levine v Diamanthuset, Inc., 950 F.2d 1478, 1483 (9th Cir. 1991) . A court may however consider exhibits submitted

with complaint and matters that may be judicially noticed pursuant to the Federal Rule of Evidence, Rule 201. Hal Roach Studios, Inc. v Richard Feiner & Co.., 896 F.2d 1542, 1555 n.19 (9th Cir. 1989); Mack v South Bay Beer Distributors, Inc., 798 F.2d 1279 (9th Cir. 1986).

Federal Defendants' Motion to Dismiss

The United States argue that claims against the federal defendants for acts performed in their official capacities is actually a case against the United States. As such, the government argues these claims must be dismissed because the United States is not subject to suit for the claims alleged in the complaint.[2]

Unless waived, the doctrine of sovereign immunity bars claims for money damages against the United States, a federal agency, or a federal officer or a federal employee. Assiniboine and Sioux Tribes v Board of Oil and Gas

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[2] Defendants admit that plaintiff might be able to state a cause under 26 U.S.C. 7431(a) for damages for unauthorized disclosure of plaintiff's tax returns.

Conservation, 792 F.2d 782, 792 (9th Cir. 1986); Gilbert v DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985). Pursuant to the Westfall Act, 28 U.S.C. Section 2671 et seq., the complaint must be dismissed to the extent it seeks to hold the federal defendants liable in their official capacities for common law torts. In this regard, by passage of the Westfall Act, federal employees are protected from personal liability for common law torts committed in the scope of their employment. Pursuant to 28 U.S.C. Section 2679(b)(1) and 2679 (d)(1), federal employees enjoy absolute immunity from suits under state laws and United States is to be substituted as the party defendant for federal employees at the earliest stage of the case. Here, because the United States Attorney has certified that the federal defendants were acting within the scope of their office at the time of the events that gave rise to this suit, the federal defendants must be dismissed and the United States substituted in their place.

It is plain that the United States, having been

substituted in place of the federal defendants, may not be sued under the Federal Torts Claims Act for tax related claims that are the subject of this action. See 28 U.S.C. 2680(c). Nor can plaintiff overcome the discretionary function exception set forth in Section 2680(a) because the decision to commence tax collection activity or to prosecute a Tax Court action is a discretionary function. Johnson v United States, 680 F. Supp. 508 (E.D.N.Y. 1987) Finally, plaintiff's first claim is barred to the extent it seeks recovery for malicious prosecution by Section 2680(h).

Similarly, defendant Weiner, who is alleged to have prosecuted the Tax Court proceedings at issue in this case, is immune from suit. See, Buckley v Fitzsimmons, 509 U.S. 259, 273, 113 S.Ct. 1934, 114 L.Ed.2d 547 (1991); Burns v Reed, 500 U.S. 478, 484-485, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991).

Finally, as the extent plaintiff asserts claims against the federal defendants under Bivens v Six Unknown Named Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), or

under 42 U.S.C. Sections 1983 or 1986, his claims must be dismissed. The Supreme Court has stated that a claim for relief will not arise under Bivens in three situations. First, where Congress has declared that the remedies it has created are exclusive remedies, a Bivens claim is not available. Bush v Lucas, 462 U.S. 367, 373, 102 S.Ct. 2404, 76 L.Ed.2d 648 (1983). Second, Bivens relief is unavailable where the design of a government program is such as to suggest that congress has provided what it considers to be adequate legal remedies. Schweiker v Chilicky, 487 U.S. 412, 423, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988). Finally, the Bivens remedy will not be available when "special factors counseling hesitation are present." Chappel v Wallace, 462 U.S. 296, 298, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983), quoting Bivens, 403 U.S. at 396. In the present case, it appears that the other remedies provided to plaintiff by the Internal Revenue Code should obviate any reason for Bivens claim. See Vennes v An Unknown Number of Unidentified Agents,

26 F.3d 1448, 1453 (8th Cir. 1994), cert. denied, 115 S.Ct 721 (1995) (agreeing with other circuit decisions to uphold the dismissal of Bivens action against IRS agents for tax assessment and collection activities); McMillen v U.S. Department of Treasury, 960 F.2d 187, 190-191 (1st Cir. 1991) (Congress has deemed Sections 7432 and 7433 the exclusive remedies for damages resulting from abuses arising in connection with any collection of Federal tax); Wages v I.R.S., 915 F.2d 1230, 1235 (9th Cir. 1990) (noting the Ninth Circuit has never recognize a constitutional violation arising from the collection of taxes and that the remedies provided by Congress foreclose a damage action under Bivens); National Commodity and Barters Association v Gibbs, supra, 886 F.2d. 1240, 1248 (10th Cir. 1989); Baddour, Inc., v United States, 802 F.2d 801, 807 (5th Cir. 1986); Cameron v Internal Revenue Service, 773 F. 2d 126, 129 (7th Cir. 1985); see also Felak v United States, 677 F.Supp. 606, 607-607 (D.Minn. 1988) (statutory method to challenge a jeopardy assessment

precludes a Bivens action for improper assessment).

Likewise, plaintiff has no claim against the federal defendants under 42 U.S.C. Section 1983. This is so because "[f]ederal officers acting under federal authority are immune from suits under section 1983 unless the state or its agents significantly participated in the challenged activity." Gibson v United States, 781 F.2d 1334 (9th Cir. 1973). As argued by the United States, the complaint at hand contains no factual allegations which would support an allegation that the federal defendants acted under the color of state law.

The Section 1985 and 1986 claims are also flawed. In order to state a cause of action under Section 1985(3), plaintiff must allege the following: (1) a conspiracy, (2) to deprive any person or class of persons of equal protection of laws, (3) an act by one of the conspirators in furtherance of the conspiracy and (4) a personal injury or property damage or deprivation of any right or privilege of a citizen of the

united States. Id. Here, plaintiff has failed to allege any facts that would meet these elements. Plaintiff has not, and cannot, allege a racially or class-based, invidiously, discriminatory animus behind defendants' claimed conduct as to him. Since a claim under Section 1986 requires that a claim for relief be alleged under 1985, plaintiff's Section 1986 claim must be dismissed.

For the foregoing reasons, plaintiff claims must be dismissed. Plaintiff shall have 20 days to file a first amended complaint.

ATTEST:

BY: /s/ Jim Holmes
DEPUTY CLERK

(SEAL)

Appendix 25

Filed March 26, 1999

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WALE O. OSIJO, Plaintiff,	* CV 98-1880-CAS (BQR)
vs.,	* JUDGMENT
THE UNITED STATES OF AMERICA, et al Defendants	*

Pursuant to the Order of the Court adopting the conclusions and recommendations of the United States Magistrate Judge,

It is adjudged that:

(1) Plaintiff's Motion for Restitution of Funds is DENIED;

(2) Defendants Murphy and Farrell's Motion for Sanction is DENIED;

(3) Plaintiff's motion to Join David Salisbury as a Defendant is DENIED;

(4) Defendants Murphy and Farrell's Motion to Dismiss is GRANTED;

(5) Defendants Ganong, Boucher, and Michell's Motion to Dismiss is GRANTED;

(6) Defendant Pinelli's Motion to Dismiss is GRANTED;

(7) Defendant Risk Enterprise Management's Motion to Dismiss is GRANTED;

(8) Defendant Sanders' Motion to Dismiss is GRANTED;

(9) The First Amended Complaint id Dismissed with prejudice.

DATED: March 26, 1999

/s/ Christina A. Snyder
UNITED STATES DISTRICT JUDGE

ATTEST:

By: /s/ Jim Holmes
DEPUTY

(SEAL)

Appendix 27

Filed March 26, 1999

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WALE O. OSIJO, Plaintiff,	* CV 98-1880-CAS (BQR) *
vs.,	* ORDER ADOPTING * REVISED REPORT AND
THE UNITED STATES OF AMERICA, et al., Defendants.	* RECOMMENDATION OF * MAGISTRATE JUDGE *

Pursuant to 28 U.S.C. Section 636(b)(1)(C), the Court has reviewed Plaintiff's First Amended Complaint, the Defendants' Motion to Dismiss and Motion for Sanction, Plaintiff's Motion for Restitution of Funds, Plaintiff's Motion for Joinder, all of the records and files herein and the attached Revised Report and Recommendation of the United States Magistrate Judge, and has made a de novo determination of the Revised Report and Recommendation. The Court concurs with and adopts the conclusion of the Magistrate Judge.

IT IS ORDERED that the court approves and adopts the

Appendix 28.

Revised Report and Recommendation, and:

(1) DENIES Plaintiff's Motion for Restitution of Funds;

(2) DENIES Defendants Murphy and Farrell's Motion for Sanctions;

(3) DENIES Plaintiff's Motion to Join David Salisbury as a Defendant;

(4) GRANTS Defendants Murphy and Farrell's Motion to Dismiss;

(5) GRANTS Defendants Ganong, Boucher and Michell's Motion to Dismiss;

(6) GRANTS Defendant Pinelli's Motion to Dismiss;

(7) GRANTS Defendant Risk Enterprise Management's Motion to Dismiss;

(8) GRANTS Defendant Sanders' Motion to Dismiss; and

(9) DISMISSES the First Amended Complaint with prejudice

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate Judge's Revised Report and Recommendation, and the Judgment herein by United

Appendix 29

States mail on Plaintiff and Defendants.

DATED: March 26, 1999

/s/ Christina A. Snyder

United States District Judge

ATTEST:

BY: /s/ Jim Holmes
DEPUTY

(SEAL)

Appendix 30

Filed March 3, 1999

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WALE O. OSIJO, Plaintiff,	* CV 98-1880-CAS (BQR) *
vs.,	* REVISED REPORT AND
THE UNITED STATES OF AMERICA, et al,	* RECOMMENDATION OF * UNITED STATES
Defendants	* MAGISTRATE JUDGE

This Revised Report and Recommendation is submitted to the United States District Judge Christina A. Snyder, pursuant to 28 U.S.C. Section 636 and General Order 194 of the United States District Court for the Central District of California.

1.

PROCEEDINGS

Plaintiff Wale O. Osijo, proceeding pro se, filed this action on March 16, 1998, pursuant to 42 U.S.C. Section 1983. The United States was substituted as a Defendant for the three named individual employees of the IRS, and the

Complaint was dismissed with leave to amend by Order of the District Court dated June 29, 1998. Plaintiff filed a First Amended Complaint on July 7, 1998, which named the United States as a Defendant, and which added causes of action related to disclosures of his personal income tax return information pursuant to 26 U.S.C. Sections 6103(a), 6212(a), 7431 and 7433.

On December 8, 1998, Plaintiff and counsel for Defendants Murphy and Farrell, Risk Enterprise Management and the United States, appeared before United States Magistrate Brian Quinn Robbins. The Court heard argument on the following motions:

(1) Plaintiff's Motion for Restitution of Funds;

(2) Plaintiff's Motion for Joiner of David Salisbury;

(3) Defendant Murphy and Farrell's Motion for Rule 11 Sanctions;

(4) Defendant Murphy and Farrell's Motion to Dismiss;

(5) Defendant Risk Management's Motion to Dismiss;

(6) Defendant Pinelli's Motion to Dismiss;

(7) Defendant Sanders' Motion to Dismiss;

(8) Defendants Ganong, Boucher, and Michell's Motion to Dismiss;

(9) Plaintiff's Motion for Reconsideration of Magistrate Judge's Order; and

(10) Defendant Risk Management's Motion to Compel Discovery.

On December 14, 1998, Magistrate Judge Robbins issued a Minute Order ruling on Plaintiff's Motion for Reconsideration of Magistrate Judge's Order and Defendant Risk Management's Motion to Compel Discovery. On December 23, 1998, the Court filed a Report and Recommendation regarding the remaining motions.

Plaintiff filed Objections to the Report and Recommendation on January 4, 1999. Defendants Murphy and Farrell filed a Response to Plaintiff's objections on January 11, 1999. Defendant Risk Enterprise Management

filed a Response to Plaintiff' objections on January 15, 1999. Plaintiff filed a Reply to these responses on January 21, 1999. On February 24, 1999, the District Court entered an Order which granted summary judgment in favor of Defendant United States on two of Plaintiff's claims, and entered judgment in favor of Plaintiff on the remaining claim. After consideration of Plaintiff's Objections and the District Court's February 24, 1999 Order, the Court hereby vacates the Report and Recommendation filed on December 23, 1998, and submits this Revised Report and Recommendation

II.

PLAINTIFF'S ALLEGATIONS

The First Amended Complaint ("FAC") involve events which unfolded after a settlement was reached in June 1991 in a personal injury lawsuit, filed on behalf of Plaintiff, wherein Plaintiff was represented by attorney Georgia A. Michell, a Defendant herein. (FAC, P. 5, 12, and 47). Plaintiff alleges that Defendant Michell settled the lawsuit

for $250,000 without his knowledge or consent by conniving with Defendant Home Insurance Company, with their attorney Defendant Pinelli, and with a staff attorney with the California Department of Industrial Relations, to set up a sham settlement conference at the Judicial Arbitration and Mediation Service in San Francisco, that Defendant Michell embezzled $127,500 of the settlement proceed from Plaintiff (Id. P 12, 46). Plaintiff alleges that Defendant Michell withdrew $100,000 from the settlement proceeds for her legal fees, deposited the remaining $150,000 in a trust account bearing interest at 2.5 percent, withdrew the $12,500 in interest which had accumulated by September 1992 (which she improperly claimed was outstanding 5 percent balance due in her legal fees), and paid $10,000 to the California Department of Industrial Relations to settle an outstanding claim for Workers Compensation benefits, all without his knowledge or consent. (Id. P 47).

Plaintiff alleged that he filed a legal malpractice action

against Defendant Michell, and that he filed a complaint against her with the State Bar of California. (Id. P 12). The State Bar investigation resulted in a stipulated finding that Defendant Michell had represented Plaintiff with actual conflict of interest, and she was placed on probation for one year. (Id.)

Plaintiff alleged that in retaliation for filing the complaint against Defendant Michell with the State Bar, Defendant Michell, along with the attorneys who represented Defendant Michell in the legal malpractice action brought against her by Plaintiff, who were identified as Defendants Suzanne Boucher, John Ganong, James Murphy and Antoinette Farrell, prosecuted and acquired a sham judgment of $28,000 against Plaintiff on a cross-claim for malicious prosecution. (Id. P 13). Plaintiff alleges that although the cross-claim judgment was overturned on appeal, the underlying legal malpractice action and the cross complaint are still pending and unresolved in the Superior

Court of Contra Costa County because employees of the Superior Court , in concert and connivance with Defendants Michell, Boucher, Farrell, Ganong, Murphy and the Home Insurance Company, are threatening Plaintiff's life in an effort to discourage him from prosecuting that action. (Id. P 13).

Plaintiff alleges that, also in retaliation for filing the complaint with the State Bar and in an effort to discourage him from prosecuting his legal malpractice action, Defendants Michell, Farrell, Ganong, Murphy, and the Home Insurance Company caused employees of the IRS in Fresno, California, identified as Penny Childers, Barbara Salisbury and Mark A. Weiner, to conduct, beginning in late 1993, and continuing to date, tax investigation and collection proceedings against Plaintiff and his clients in violation of federal tax law. (Id. P 14). Plaintiff alleges that since late 1993 to date, "that whenever there is and was a major decision to be made by the Courts, or a major

document to be filed in the Courts, it will be proceeded by letters of intended audit examinations of Mr. Osijo's clients by one and only Ms. Salisbury." (Id.)

On September 26, 1997, during the trial of certain income tax deficiency determinations made by Ms. Salisbury, Plaintiff discovered that Defendants Boucher, Farrell, Michell, Ganong, Murphy and the Home Insurance had turned over his legal file to the IRS, and that these Defendants had told the IRS that they had paid Plaintiff $9,000 in interest income, which he had not reported to the IRS, on the funds that Defendant Michell had allegedly kept in trust from July 1991 to June 1993. (Id. P 18). Plaintiff alleges that in late 1993, when Ms. Salisbury learned that Plaintiff has not filed a tax return since 1989, she did not contact him directly as required by the tax code, but rather used Plaintiff's social security number to ascertain the identity of all the clients of Plaintiff for whom Plaintiff prepared tax returns, ninety-five percent of whom are

African American of Nigerian dissent, a fact known to Ms. Salisbury, and passed this information to Defendants Boucher, Farrell, Michell, Ganong, Murphy and the Home Insurance Company (Id. P 18)

Unable to discover unreported taxable income based on the tax returns prepared by Plaintiff, Ms. Salisbury allegedly conducted examinations of 7 of Plaintiff's clients for the years 1993-1996, and summoned Plaintiff to appear before her at the IRS office regarding an allegedly fraudulent tax return Plaintiff had prepared on behalf of a client. (Id. P 20).

Ms. Salisbury requested a list of Plaintiff's clients, believing that there was a basis for a source of unreported income which Plaintiff received from secret clients, a request Plaintiff refused based on the fiduciary duty he owed to his clients. (Id.) It was at this meeting that Plaintiff was first asked why he had not filed tax returns for 1989-1992, at which time he explained that he had been convalescing from

15 gunshot wounds and pursuing his Master's Degree during that time. (Id. P21). Ms. Salisbury allegedly asked Plaintiff when he was going to go back to his country of origin, and stated "I am sick and tired of foreigners who can't even speak a work [sic] of English taking over my country. It is the more [sic] reason I moved to Fresno, California from New York City." (Id. P 22).

Plaintiff reported his encounter with Ms. Salisbury to Penny Childers, an IRS supervisor, who dismissed Plaintiff as a trouble maker, and who retaliated against Plaintiff by summoning him into the IRS Fresno office on April 17, 1996, where he was met by United States Secret Service agents and accused of making death threats to the IRS, because Plaintiff had "used adages, which included death, to illustrate himself in his letters to Ms. Salisbury." (Id. PP 23-24). Ms. Salisbury allegedly threatened Plaintiff with incarceration if he did not file back tax returns. (Id.) Plaintiff alleges that Ms. Salisbury prepared her own tax returns for

Plaintiff and determined that Plaintiff owed the IRS $23,000, a determination overturned by the United States Tax which found Plaintiff owing no back taxes, but the entire incident caused Plaintiff to become paranoid so as to leave Fresno without a forwarding address as if he were a fugitive, and preventing him from pursuing his normal life as a tax consultant. (Id. PP 26-30).

After the Tax Court found that Plaintiff had no tax liability for 1989-1992, Ms. Salisbury allegedly made another tax deficiency determination, this time for the years 1994-1995, and mailed a Statutory Notice of Deficiency on November 11, 1997 to Plaintiff's former address in Fresno, an address which Defendant Salisbury knew to be invalid, despite having knowledge of Plaintiff's correct address, and that the notice was returned undeliverable. (Id. P 32-33). When Ms. Salisbury, Mark Weiner and Penny Childers were personally served with the summons and complaint in this action, they allegedly retaliated against Plaintiff by levying

$1,220.71, and have refused to release the levy to date even though they have been notified that the Statutory Notice of Deficiency was invalid because it was intentionally mailed to the wrong address. (Id. P35). Plaintiff alleges that after the Assistant United States Attorney assigned to this matter received Plaintiff's Motion to Set Aside or Reverse the deficiency determination filed in this Court, someone in the IRS sent a Final Notice of Intent to Levy asking for immediate payment of $6,904.16. (Id. P36).

Plaintiff alleges that Ms. Salisbury, Mark Weiner and Penny Childers disclosed information contained in his IRS files to Defendants Boucher, Farrell, Michell, Ganong, Murphy and the Home Insurance, whom they knew were Plaintiff's eternal foes, thereby providing them with financial information they would not otherwise be able to obtain, and which they used in their prosecution of the cross-claim for malicious prosecution. (Id. P39). Ms. Salisbury also allegedly disclosed confidential tax

information belonging to Plaintiff's clients to Defendants Boucher, Farrell, Michell, Ganong, Murphy and the Home Insurance Company, which caused Plaintiff's clients to stop bringing their tax returns to him for preparation, amounting to loss of approximately 300 clients at $300 fee per client, and caused infighting between Plaintiff, his relatives and friends. (Id. PP 41-42).

In August 1993, Plaintiff discovered that the Home Insurance Company has written the settlement check in his personal injury action, and had entered a secret agreement to settle that case without his knowledge or consent, and that they had paid for the legal representation of Defendant Michell in the legal malpractice action he had brought against her. (Id. P49). Plaintiff alleges that Defendant Judith Sanders, a discovery referee for the Contra Costa County Superior Court was the liaison between Defendants Boucher, Farrell, Michell, Ganong. Murphy, Home

Insurance, and Contra Costa County Superior Court Judges Dolgin, Van de Poel, Trembath, Zuniga and Rogers, and that Sanders was behind the effort limit Plaintiff's damages to $12,500 and to coerce him into settling that action. (Id. PP 55-59).

Plaintiff contends the Defendants violated his rights to due process and equal protection, that they illegally disclosed his confidential tax information. Plaintiff seeks restitution of the $127,500 balance of the settlement agreement plus interest from 1991 to date; economic damages for loss of earing; damages for pain and suffering; mileage reimbursement for 650,000 miles; $500,000 compensatory damages for injuries suffered from high blood pressure and depression; $200,000 from defendant Sanders for denial of equal protection; and reversal of the tax deficiency determination of $6,904.16 due to improper mailing of the Statutory Notice of Deficiency.

III.

DISCUSSIONS

Defendants Murphy, Farrell, Pinelli, Sanders, Ganong, Boucher, Michell and Risk Enterprise Management (who Plaintiff alleges is the successor-in-interest to the Home Insurance Company) all move to dismiss the First Amended Complaint pursuant to Fed.R.Civ.P. 12(b)(6). These Defendants argue that: (1) the applicable statute of limitation on Plaintiff's claims has run; (2) there is no basis for liability for disclosure of tax information under 28 U.S.C. Sections 6103, 6212, 7431 and 7433; (3) that these Defendants were not state actors for purposes of 42 U.S.C. Section 1983; (4) that Plaintiff's claims are barred res juridicata; and (5) that Plaintiff has failed to exhaust his administrative remedies.

Defendant Murphy and Farrell moved for sanctions against Plaintiff pursuant to Fed.R.Civ.P. 11, contending that Plaintiff is merely attempting to re-litigate issues previously addressed in the state courts, and that this action is brought

for the purpose of harassment. Plaintiff moves this Court to order the restitution of $127,500 which Plaintiff alleges Defendant Michell embezzled from him, and seeks an order directing the Defendant to pay to him the $23,000 in attorney fees that was awarded on his successful appeal of the malicious prosecution cross-claim in the state court. Plaintiff also seek to add David Salisbury as a Defendant pursuant to Fed.R.Civ.P. 17

The First Amended Complaint purports to state causes of action against all Defendants pursuant to 42 U.S.C. Section 1983 for violations of Plaintiff's equal protection and the due process rights under the color of state law, and for improper disclosure of his tax return information pursuant to federal laws. However, the motions presently before the Court do not involve Defendant United States, who was substituted in as a Defendant in place of the individual employees named in the original complaint. The District Court's Order dated June 29, 1998, granted the motion to dismiss brought

by Mark Weiner, Penny Childers and Barbara Salisbury and dismissed these defendants from this action. The First Amended Complaint does not appear to name these persons as Defendants in this action, as they are not identified in the caption and no relief is sought against them. However, to the extent Plaintiff intended to name these persons as defendants, he cannot maintain a claim against them for reasons set forth below and in the District Court's June 29, 1998 and February 24, 1999 Orders.

Because the Court finds that Plaintiff has failed to allege that any of the moving Defendants herein, with the exception of Defendant Sanders, were acting under color of state law as required by 42 U.S.C. Section 1983, the Court recommends granting the motions to dismiss those claims brought by the private party Defendants. The Court rejects Plaintiff's contention raised in his Objection to the Report and Recommendation that this Court has diversity jurisdiction over his claim. The Court also recommends

granting Defendant Judith Sanders' motion to dismiss because she is entitled to absolute judicial immunity.

The Court also finds that Plaintiff has failed to state a claim based on the alleged disclosure of his tax information to these Defendants. There is no allegation that these Defendants disclosed any of Plaintiff's tax return information. Rather, Plaintiff merely alleges that the IRS employees disclosed his tax return information to these Defendants, who then used that information to their advantage regarding litigation strategy and to levy against his bank accounts. The District Court granted summary judgment in favor of the United States on Plaintiff's disclosure claims in its February 24, 1999 Order, finding that the disclosure made by the IRS employees in this case were authorized by the Tax Code and implementing regulations (See 2/24/99 Order at 8). Moreover the moving Defendants are not included in the scope of persons liable under the applicable statutes. Therefore, the Court recommends

granting the Defendants' motion to dismiss, and dismissing these claims with prejudice.

The District Court's February 24, 1999 Order resolved all claims in the First Amended Complaint against the United States by granting summary judgment in favor of the United States on two of three claims in the First Amended Complaint, and in favor of Plaintiff on the remaining claim. Because the Court now recommends dismissal of all remaining defendants named in this action, the Court also recommends dismissal of this entire action with prejudice.

The Court also recommends denying Plaintiff's Motion for Restitution, and denying Defendant Murphy and Farrell's Motion for Sanction. Finally, the Court recommends denying Plaintiff's Motion to Join David Salisbury as a Defendant.

A. Applicable Legal Standards

A complaint may be dismissed as a matter of law for two reasons: (1) lack of cognizable theory; or (2) insufficient fact

under a cognizable theory. Balistreri v Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988). In determining whether a complaint states a claim, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. Love v United States, 915 F.2d 1242, 1245 (9th Cir. 1989). A complaint should not be dismissed unless it appears beyond doubts that plaintiff can prove no set of facts in support of his claims which would entitle him to relief. Buckey v Los Angeles, 968 F.2d 791, 794 (9th Cir.). cert. denied, 506 U.S. 999 (1992).

If the plaintiff appears pro se, the court must construe the pleadings liberally and must afford him the benefit of any doubt. Karim-Panahi v Los Angeles, 839 F.2d 621, 623 (9th Cir. 1988). A pro se litigant must be given leave to amend his or her complaint unless it is absolutely clear that the complaint could not be cured by amendment. Noll v Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987).

In order to state a claim under 42 U.S.C. Section 1983, a

plaintiff must allege that the defendant, acting under the color of state law, deprived the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States. Karim-Panahi, 839 F.2d at 624

B. Plaintiff has Failed to Allege the Private Party Defendants were Acting Under Color of State Law

It is clear that the First Amended Complaint contains no allegations that any Defendant, other than Contra Costa County Discovery Referee Sanders, was acting under the color of state law. Defendant Michell was acting as a private attorney representing Plaintiff in a personal injury action. Defendants Murphy and Farrell are private attorneys alleged to have represented Defendant Michell in the legal malpractice action brought against her by Plaintiff. Defendants Ganong and Boucher are also private attorneys alleged to have represented Defendant Michell in the legal malpractice action. Defendant Pinelli is a private attorney who was retained by the Home Insurance Company to

represent one of the defendants in Plaintiff's personal injury action, and who brought motion to enforce the settlement agreement in that action. The allegation against Defendant Home Insurance, to which Risk Enterprise Management has responded, involve a conspiracy to settle Plaintiff's personal injury action.

All allegations against these Defendants involve their actions as private attorneys and are not sufficient to satisfy the state actor requirement of Section 1983. See Polk County v Dodson, 454 U.S. 312, 317-318, 319 n.9, 102 S.Ct. 445, 449-450, 70 L.Ed.2d 509 (1981) (private attorney performing a lawyer's traditional function cannot be considered to act under the color of state law). Although these Defendants are private actors, private parties who corruptly conspire with a judge in conjunction with the judge's performance of an official judicial act are acting under the color of state law for the purpose of 1983, even if the judicial officer is immune from civil liability. Dennis v Sparks, 449 U.S. 24, 28-29, 101

S.Ct. 183, 186-187, 66 L.Ed.2d 185 (1980).

The only allegations in the First Amended Complaint regarding a conspiracy with a state actor involves Defendant Contra Costa County Discovery Referee Judith Sanders. Defendant Sanders is alleged to be a judicial officer of the Superior Court, but is not alleged to have perform any act whatsoever, other than generally to preside over discovery issues in Plaintiff's legal malpractice action. Based on the allegations of the First Amended Complaint, there is no question that this Defendant is immune from civil liability based on the doctrine of absolute judicial immunity. See Mireles v Waco, 502 U.S. 9, 11-12, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991); Franceschi v Schwartz, 57 F.3d 828, 830-831 (9th Cir. 1995). Plaintiff states in his opposition that Defendant Sanders continued to rule on discovery issues without the parties' consent and after she "had been expressly told not to participate in the legal malpractice action anymore, since 1993." These new allegations are not properly before the

Court. See Gillian v Jamco Development Corp., 108 F.3d 246, 248 (9th Cir. 1997); Branch v Tunnell, 14 F.3d 449, 453 (9th Cir. 1994), cert. denied. 512 U.S. 1219 (1994); Hal Roach Studios, Inc v Richard Feiner & Co., 896 F.2d 1542, 1555, n.19 (9th Cir. 1990). The Court will not consider allegations raised for the first time in opposition to a motion to dismiss. See Diaz v Carlson, 5 F. Supp.2nd 809, 813 (C.D.Cal. 1997) (typically , a court will not consider material outside of the complaint on a motion to dismiss); Moskowitz v Vitalink Communications, Corp., 745 F.Supp. 155, 157 (N.D.Cal. 1990); Alfus v Pyramid Technology Corp., 745 F.Spp. 1511 (N.D.Cal. 1990). However these new allegations are insufficient to overcome judicial immunity. See Stump v Sparkman, 435 U.S. 349, 356, 98 S.Ct. 1099, 56 L.Ed.2d 331 (1978) (absolutel judicial immunity applies for judicial acts even when such acts are in excess of their jurisdiction and are alleged to have been done maliciously or corruptly) All of the allegations regarding Defendant Sanders involve

judicial acts, and she is therefore entitled to immunity.

Plaintiff set forth only conclusory and vague allegations of a conspiracy between Defendant Sanders and the private attorney Defendants. He alleges that Defendant Sanders "was behind all the efforts to limit his damages" and was a "liaison " between the attorney Defendants and the superior court judges involved in his lawsuits. There is no allegation of corruption or wrongdoing, nor any allegations of any acts, judicial or otherwise, taken by Defendant Sanders in furtherance of the alleged conspiracy. Thus Plaintiff has failed to allege state action by the private attorney Defendants. See Ivey v Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982)(vague and conclusory allegations of official participation in civil rights violations are insufficient to withstand a motion to dismiss).

Because it is clear that Defendants Murphy, Farrell, Pinelli, Ganong, Boucher, and Michell were not acting under color of state law, the First Amended Complaint failed to

state a claim against these Defendants under Section 1983, and the Court recommends granting these Defendants' motion to dismiss those claims. Because Defendant Sanders is entitled to absolute judicial immunity for her actions taken as a Superior Court Judicial Officer, the Court recommends granting her motion. Furthermore, because it is absolutely clear that Plaintiff cannot maintain a Section 1983 claim against these individuals, the Court recommends dismissal of these claims with prejudice.

C. **Plaintiff has Failed to State a Claim Against These Defendants for Disclosure of his Tax Information.**

Plaintiff attempted to state claims against all the Defendants for improper disclosure of his confidential tax information pursuant to 28 U.S.C. Sections 6103(a), 6212(a), 7431 and 7432. Only the private party Defendants move to dismiss these claims in the present motion. The District Court has ruled in its February 24, 1999 Order, that the disclosures made by the IRS employees in this case were

authorized by the Tax Code and implementing regulations. However Plaintiff alleges that the private party Defendants disclosed his legal files to the IRS, and that the IRS disclosed his tax information to the private party Defendants who then used it to obtain an edge in the prosecution of the cross-claim for malicious prosecution. As discussed below, there is no allegations that the private party Defendants disclosed Plaintiff's tax return information, merely that they used it to gain advantage against Plaintiff regarding the state court litigation.

Plaintiff's first and second causes of action are brought pursuant to 26 U.S.C. Section 7433, which provides for civil damages against employees or officers of the IRS who recklessly or intentionally disregard provisions of Title 26. See 26 U.S.C. Section 7433(a). This section does not apply to the moving Defendants herein, none of whom are IRS employees or officers. The February 24 1999 Order of the District Court granted summary judgment in favor of the

United States on this claim.

The caption of the First Amended Complaint states that this action is also brought pursuant to 26 U.S.C. 6103(a), which prohibits disclosure of tax returns and return information: (1) by officers and employees of the United States, (2) by officers or employees of any State, officers, or employees of any local child support agency, or officers or employees of any local agencies administering programs listed in Section 6103(1)(7)(D) (none of which are applicable to the moving Defendants herein), or (3) by persons who have access to information under subsection (e)(1)(D)(iii), paragraph (6) or (12) of subsection (1), paragraph (2) or (4)(B) of subsection (m), or subsection (n). See 26 U.S.C. Section 6103(a). As discussed below in Section E of this Report and Recommendation, none of the Defendants herein, other than Defendant Sanders, are alleged to be included in the scope of this definition. Commissioner Sanders is not alleged to have disclosed any of Plaintiff's tax

information. Moreover, the District Court found in February 24, 1999 Order that the disclosures Plaintiff refers to were authorized by the Tax Code and its implementing regulations. Thus, Plaintiff has failed to state a claim against any Defendants under this section.

The caption of the First Amended Complaint also identifies that this action brought pursuant to 26 U.S.C. Section 6212(a), which authorizes the Secretary of the Treasury of the United States to send notice of any tax deficiency, and as such is not directed at the moving Defendants herein. The District Court entered judgment in favor of Plaintiff and against the United States on this claim in the February 24, 1999 Order.

Plaintiff's third cause of action is brought pursuant to 26 U.S.C. Section 7431, which provides that if anyone who is not an employee of the United States "knowingly, or by reason of negligence, inspects or discloses ant [tax] return or return information...in violation of 26 U.S.C. 6103, such

taxpayer may bring a civil action for damages against such person in a district court of the United States" 26 U.S.C. Section 7431(a)(2).[1] Such action must be brought "within 2 years after the date of discovery by the plaintiff of the unauthorized inspection or discovery." 26 U.S.C. Section 7431(d) Thus, if Plaintiff became aware of the alleged disclosure prior to March 15, 1996, such claims are outside the statute of limitation. Moreover, any allegations of inspection of his tax return information prior to August 5, 1997 by these Defendants cannot form the basis for liability under this section.

The vast majority of allegations regarding the disclosure of Plaintiff's tax return information are directed at IRS employees Salisbury, Weiner and Childers, who are not parties to the motion herein, and who have been dismissed

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[1] This section was previously limited to disclosure of tax information, but was amended so as to include inspection of tax information occurring on or after August 5, 1997. See Pub.L. 105-35, section 3(e), 26 U.S.C. Section 7431(a)(2) (Historical and Statutory Notes, West Supp. 1998).

by the District Court. There is no allegations that any of the moving Defendants disclosed Plaintiff's tax return information, merely that they received it from the IRS employees. The only allegations regarding the private attorney Defendants in connection to inspection or disclosure of Plaintiff's return information are that: "The essence of obtaining Mr. Osijo's financial viability was to provide the Home Insurance Companies and cronies his source of funding for the prosecution of the aforementioned legal malpractice action. It was also to provide them with Mr. Osijo's bank account, with which to levy the sham judgment mentioned in paragraph 13 above. It was their inference that if Mr. Osijo is engaged in a full time employment, he will not have the time, but [sic] the money to prosecute the legal malpractice action." (FAC P39).

Plaintiff contends that the Defendants used his tax information in their 1995 and 1996 attempt to levy on his bank account to satisfy the judgment they had obtained in

their cross-claim for malicious prosecution. (FAC P13). Plaintiff also alleges that this judgment was overturned on April 12, 1996. (FAC P49; Original Complaint P26). Thus Plaintiff has alleged that this information was obtained by the Defendants prior to April 12, 1996. Therefore, the alleged inspection of his tax return information by these Defendants occurred prior to August 5, 1997, at which time such inspection was not prohibited by 26 U.S.C. Section 7431, and this section cannot be the basis of a claim for inspection. Plaintiff has not alleged a disclosure of his tax return information by these Defendants, but merely its inspection and its use against his bank accounts, and to obtain an advantage in the litigation being aware of his financial situation.

To the extent that Plaintiff has attempted to allege a claim for disclosure against these Defendants in the First Amended Complaint, Plaintiff's only allegations regarding disclosure of his private information by these Defendants

refer to disclosure of his legal files to the IRS, not the disclosure of his tax return information by these Defendants, although in his Objection, Plaintiff adds allegations of disclosure medical records to the IRS employees. Moreover, as discussed below in Section E of this Report and Recommendation, the scope of persons liable under Section 7431(a)(2) is limited by Section 6103, and does not encompass any of the moving Defendants herein. Finally, the District Court's February 24, 1999 Order granted summary judgment in favor of the United States on Plaintiff's claim for disclosure of his tax return information precludes a finding that the information was disclosed in violation of 26 U.S.C. Section 6103, as is required to maintain a cause under 26 U.S.C. Section 7431(a)(2). Therefore, Plaintiff has not stated a claim for the disclosure or inspection of his tax return information against these Defendants.

To the extent that Plaintiff is attempting to state a claim

under Section 1983, for disclosure of confidential information by the private party Defendants, he has failed to state a federal claim. Plaintiff alleges: "That it was on September 26, 1997, at the trial of the income tax deficiency determinations made by Ms. Salisbury that Mr. Osijo found out that Ms. Boucher, Farrell and Michell, and Messrs. Ganong and Murphy, the Home Insurance had actually submitted to the IRS that they had paid Mr. Osijo approximately $9,000 in interest income on the money that Ms. Michell purportedly kept in trust for him from July 1991 to June 1993, without his knowledge or consent. It was also at the trial that Mr. Osijo found out that his entire file with Ms. Boucher, Farrell and Michell, and Messrs. Ganong and Murphy was turned over to Ms. Childers, Salisbury and Mr. Weiner, and other unknown individual employees of the IRS, for taxable years 1989 to 1994." (FAC P16). Plaintiff has not alleged that these Defendants were acting under the color of state law, and has not stated a federal claim based

on the alleged disclosure of any information by the private party Defendants. Therefore, the Court finds that the First Amended Complaint fails to state a federal claim.

In his Objection to the Report and Recommendation, Plaintiff argues that this Court has diversity jurisdiction over his claims pursuant to 28 U.S.C. Section 1332. Section 1332 confers jurisdiction on federal courts when each defendant is a citizen of a different state from the plaintiff. Owen Equipments & Erection Co. v Kroger, 437 U.S. 365, 373-74, 98 S.Ct. 2396, 2402, 57 L.Ed2d 274 (1978). Plaintiff bears the burden of pleading and proving facts establishing diversity jurisdiction. Bautista v Pan American World Airlines, Inc., 828 F.2d 546, 552 (9th Cir. 1987).

In order to establish diversity jurisdiction, Plaintiff must allege a claim cognizable under the state law. See Stock West, Inc. v Confederated Tribes, 873 F.2d 1221, 1226-1227 (9th Cir. 1989). The only state law claim identified in the First Amended Complaint is contained within the fifth cause of

action, and is for conversion, and seeks damages from Defendant Sanders for denial of equal protection, but does not seek damages for conversion. (See FAC p. 25-28). It appears that Plaintiff is alleging that the settlement proceeds and interest accrued thereupon were converted by the Defendants for their own use. Plaintiff has failed to state a claim for conversion of the settlement proceeds in this action, because he has alleged that he currently pursuing this claim in the state court. (See FAC P13). For reasons discussed below, this Court is divested of jurisdiction over this claim based on the Rooker-Feldman doctrine, due to the state court's continuing adjudication of Plaintiff's claim that the settlement proceeds were improperly withheld from him, or that his personal injury action was settled without his consent. See Ankenbrandt v Richards, 504 U.S. 689, 705-706, 112 S.Ct. 2206, 2216, 119 L.Ed.2d 468 (1992).

Plaintiff also indicated in his Objections, that he wishes to amend the First Amended Complaint in an attempt to

state claims for the 4th and 14th Amendment based on the disclosure of his legal and medical records. Plaintiff alleges that Mark Weiner, Barbara Salisbury, Penny Childers as well as Defendants Boucher, Farrell, Ganong, Michell, Murphy and Risk Enterprises Management "... rummaged through Plaintiff's entire medical records and data, in concerted effort to find evidence that Plaintiff received taxable lost wages from any source, between 1989 and 1994, which he might have disclosed in the course of discovery in Plaintiff's personal and legal malpractice actions.. Therefore, Defendants Boucher, Farrell, Ganong, Michell, Murphy and other unknown employees and agents of Risk Enterprise Management, Ltd., turned over Plaintiff's entire medical records to the aforementioned employees of the IRS, who up till today are still in possession and control of the said medical records and data, and continued to rummage through these file." (See Objection at 2). For the reasons discussed above, this does not state a federal claim.

However Plaintiff appears to contend that these allegations might form the basis of a state law claim, although he does not identify any particular state claim.

Plaintiff's allegation of disclosure of his legal and medical files are completely conclusory and unspecific. He alleges that every named Defendant in this action had a hand in "rummaging" through his files, but does not allege the nature or source of the records which were allegedly disclosed, does not provide the Defendant with sufficient details from which they could defend such a claim, including the assertion of privileges and authorization defenses and does not allege what information was disclosed to whom or when. Although it is not clear that Plaintiff intended to state a claim under state law for disclosure of his legal and medical records, the Court finds that Plaintiff has failed to state a claim. See Hill v National Collegiate Athletic Association. 7 Cal.4th 1, 20, 39-40, Cal.Rptr.2d 834, 865 P.2d 633 (1994) (a plaintiff alleging a

violation of privacy rights under state law must establish a legally protected privacy interest, a reasonable expectation of privacy interest under the circumstances and conduct by the defendant constituting a serious invasion of privacy). Neither the allegations in the First Amended Complaint nor the proposed allegations in Plaintiff's Objections alleged facts sufficient to state a claim based on the alleged disclosure of his legal and medical files.

The Court finds and concludes that Plaintiff has failed to identify any claim cognizable under state law which are not intertwined with the state court adjudication of his on going litigation regarding the settlement of his personal injury action. Therefore, Plaintiff has failed to establish diversity jurisdiction.

D. Plaintiff's Motion for Restitution Should be Denied

Plaintiff requests this Court to order restitution of $127,500 plus interest from Defendants Pinelli, Michell, Ganong, and Risk Enterprise Management as the successor-

in-interest to the Home Insurance Company. This amount represents that portion of the $250,000 settlement proceeds retained by Defendant Michell, plus interest, after $131,537.05 was disbursed to Plaintiff. (See Motion for Restitution, Exh. 1 p. 6). Plaintiff also requests this Court to order Defendants Boucher, Farrell, Ganong, Michell and Murphy to pay Plaintiff $23,000 plus interest, an amount which Plaintiff was awarded for attorney fees on appeal when he succeeded in having the judgment awarded in the malicious prosecution cross-claim in the state court reversed. Plaintiff has alleged that the action to recover settlement proceeds as well as the cross-claim for malicious prosecution, is still pending in the Contra Costa County Superior Court. (FAC P13).

Plaintiff is requesting this Court to interfere with the orderly disposition of his state law claims currently being adjudicated in the state courts, and has set forth no justification or rationalization for his request. Neither has

Plaintiff identified any basis upon which this Court could enforce a judgment of attorney fees awarded in state court. This Court lacks appellate jurisdiction to review state court decisions reached in judicial proceedings. District of Columbia Court of Appeals v Feldman, 460 U.S. 462, 103 S.Ct 1303, 75 L.Ed.2d 206 (1983); Rooker v Fidelity Trust Co., 263 U.S. 413, 415-16, 44 S.Ct. 149, 68 L.Ed. 362 (1923). Moreover, the $127,500 Plaintiff seeks in his motion is also included in his demand for relief for his fourth cause of action (see FAC p.24), and represents the balance of the $250,000 settlement proceeds, plus interest, less the $131,537.05 Plaintiff has already received from Defendant Michell (see Motion for Restitution, Exh. 1 p. 6). Because the Court finds that plaintiff is seeking entry of judgment against Defendants against whom he has failed to state a claim in this action, and because this Court lacks jurisdiction to enforce or review state court judgments, the Court recommends denying Plaintiff's Motion for Restitution.

D. **Plaintiff's Motion to Join Defendant David Salisbury Should be Denied**

Plaintiff seeks leave of Court, pursuant to Fed.R.Civ.P. 17, to join David Salisbury, the husband of IRS employee Barbara Salisbury, as a defendant in this action. Plaintiff states as a ground for this motion that he intends to allege that Barbara Salisbury disclosed Plaintiff's tax return information to her husband David Salisbury in violation of 26 U.S.C. Sections 6103 and 7431 "such that Mr. Salisbury appeared in the United States Tax Courtroom on September 26, 1997, with Mrs. Salisbury, and the attorneys for the Commissioner of Internal Revenue, Mr. Mark A. Weiner and Ms. Margaret Tinagero. Sat with them in [sic] the same table, in the open Courtroom, and went out to discuss the Commissioner's strategy on the aforementioned case." (Motion for Joiner p. 1).

It appears that Plaintiff s trying to state a claim against David Salisbury pursuant to 26 U.S.C. Section 7431(a)(2) by

inspecting and perhaps disclosing his tax return information. However, Plaintiff has not alleged that David Salisbury is included in within the scope of persons liable under Section 7431(a)(2).

The plain language of Section 7431 states that a taxpayer may bring a civil action against any person who discloses any return or return information "in violation of any provision of section 6103..". 26 U.S.C. Section 7431(a)(2). Section 6103 prohibits three categories of persons from disclosing tax return information. The first category is set forth in 6103(a)(1) and includes officers and employees of the United States. The second category is set forth in 6103(a)(2) and includes officers and employees of any state, or of any local child support enforcement agency, and officers and employees of any local agencies administering certain programs listed in 26 U.S.C. Section 6103(1)(7)(D), none of which apply to David Salisbury or any Defendant named in the First Amended Complaint.

The third category is set forth in 26 U.S.C. Section 6103(a)(3) and includes persons who have received or have access to corporate return information through their capacities as bona fide stockholders of a corporation (see Section 6103(e)(1)(D)(iii); persons who have been provided mailing address by the Secretary of the Treasury for use in locating a taxpayer in order to collect or compromise a federal claim against a taxpayer in accordance with 31 U.S.C. Sections 3711, 3717 or 1718 (see Section 6103(m)(2)); officers and employees who are agents of a federal consumer reporting agency (see Section 6103(m)(2)(B)); certain educational institutions and their officers and employees (see Section 6103(m)(4)(B); and persons who have received returns or return information from the Secretary of the Treasury in connection with the processing, storage, transmission and reproduction of such information and the programming, maintenance, repair, testing and the procurement of equipment for purposes of tax

administration pursuant to regulations prescribed by the Secretary of the Treasury. (See Section 6103(n)).

Plaintiff has alleged that Defendant Salisbury sat at the counsel table with his wife, who is alleged to be a federal employee, during his tax court hearing. However, Plaintiff has made no allegations which would include either David Salisbury or Defendant Murphy, Farrell, Pinelli, Ganong, Boucher, Michell or Risk Enterprise Management in any definition of persons liable for disclosure under Section 6103. Moreover, Plaintiff has not alleged that David Salisbury disclosed or inspected any of his return or return information. Finally, the District Court in its February 24, 1999 Order specifically found that Plaintiff has failed to demonstrate that there was a material issue of disputed fact with respect to his claim for unauthorized disclosure of tax information to David Salisbury. Because Plaintiff has failed to set forth a basis for a claim against David Salisbury, the Court recommends denying the motion to join David

Salisbury as a Defendant.

F. **Defendant Murphy and Farrell's Motion for Sanction Should be Denied**

Defendants Murphy and Farrell moved for sanctions against Plaintiff pursuant to Fed.R.Civ.P. 11. Defendants contends that the allegations of the First Amended Complaint are completely baseless, that the action is frivolous, and was filed for the purpose of harassing the Defendants. Defendants seeks monetary sanction of $3,580.50, dismissal of this action, and/or an order preventing Plaintiff from filing any further action against these Defendants in this Court without prior authorization.

The Court has made no findings regarding whether the facts as alleged by Plaintiff have any basis in fact, but merely made findings regarding the legal sufficiency of Plaintiff's claims. The Court does not at this time find good cause to sanction Plaintiff or enter a pre-filing order against him. Therefore, the Court recommends denying Defendants'

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Motion for Sanctions.

ATTEST:

Jim Holmes
Deputy Clerk

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Attorneys for the Federal Defendants

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

WALE O. OSIJO,	) CV 98-1880 CAS (BQR)
Plaintiff	)
vs.,	) WESTFALL ACT
MARK A WEINER, et al,	) DETERMINATION OF
Defendants	) COURSE AND SCOPE OF
	) EMPLOYMENT FOR
	) BARBARA SALISBURY
	) PENNY CHILDERS AND
	) MARK WEINER
_____	)

Plaintiff has named three federal employees as defendants alleging common law torts and Biven[1] claims

[1] See Bivens v Sx Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971)

against them. Two of the employees work for the IRS: Tax Auditor Barbara Salisbury and Compliance Manager Penny Childers of the IRS Central California District. The Third works for the IRS District Counsel at the Thousand Oaks Office: Attorney Mark Weiner.

Pursuant to the provisions of 28 U.S.C. Section 2679(d) and 28 C.F.R. Section 15.3(a), the United States Attorney Nora M. Manella has certified that the three federal employees were acting within the scope of their employment at the time of the event giving rise to this suit. Such certification is attached hereto as Exhibit 1. Therefore, to the extent that the complaint states common law tort claim against Defendants Salisbury, Penny Childers and Mark Weiner, the government will soon move the court to dismiss them from this action and substitute the United States as a defendant.

Respectfully submitted,

Nora M. Manella

Appendix 79

United States Attorney

Dated May 12, 1998

/s/
Edward M. Robbins, Jr.
Assistant United States Attorney
Chief Tax Division

Attorneys for the Federal Defendants.

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CERTIFICATION

Pursuant to the provisions of 28 U.S.C. Section 2679(d), as amended by Public Law 100-694, and by virtue of the authority vested in me by the Attorney General of the United States under 28 C.F.R. Section 15.3(a), I hereby certify as follow:

(1) I have a copy of the complaint in the case entitled Wale O. Osijo v Mark A. Weiner, et al., CV 98-1880 CAS(BQR) (C.D. Cal.).

(2) On the basis of the information now available to me with respect to the incident referred to in the complaint, Barbara Salisbury, Penny Childers and Mark Weiner were acting within the course and scope of their employment with the United States at all times material to such alleged incidents.

Dated this 20th day of April 1998

/s/
NORA M. MANELLA
United States Attorney
Central District of California

Appendix 81

T.C. Memo. 1998-38

UNITED STATES TAX COURT

WALE O. OSIJO, Petitioner v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 16925-96 January 28, 1998

Wale O. Osijo, pro se.

Mark A. Weiner, for Respondent.

MEMORANDUM OPINION

NAMEROFF, Special Trial Judge: This case was heard pursuant to the provisions of section 7443(b)(3)[1] and Rules 180, 181 and 182. Respondent determined deficiencies and additions to tax in petitioner's Federal income tax for taxable years 1989 through 1994 as set forth below:

Year	Deficiency	Addition to Tax Sec. 6651(a)(1)
1989	$2,214	$554
1990	2,189	547

[1] All section references are to the Internal Revenue Code in effect for the years at issue. All Rule references are to the Tax Court Rules of Practice and Procedure.

1991	3,088	772
1992	4,109	1,027
1993	1,047	368
1994	471	118

In the notice of deficiency, respondent determined that petitioner has failed to file Federal income tax for all the subject years. Respondent further determined for the years 1989 through 1992 that petitioner earned Schedule C income in the respective amounts of $10, 637, $10,637, $13,970, and $17,787. These determinations were based upon Bureau of Labor statistics for one person living in rented premises in Fresno, California, area, and were adjusted downward, in some years, to account for non taxable worker's compensation that petitioner had received.

For the taxable years 1993 and 1994, respondent determined that petitioner earned interest income of $8,862 and $10, respectively, and Schedule C income of $3,750 and $4,050 respectively. For 1994,, respondent further

determined that petitioner had nonemployee compensation of $2,959.

For each of the years 1989 through 1994, respondent determined that petitioner was liable for self employment tax, and for the years 1990 through 1994, that petitioner was entitled to a deduction for one-half of the self employment tax determined. Finally respondent determined that petitioner was liable for additions to tax under section 6651(a)(1) for all the years before the Court. The issues for decision pertains to whether respondent was correct in making the above determinations.

Some of the facts have been stipulated, and they are so found. The stipulation of facts and the attached exhibits are included herein by reference. Petitioner resided in Fresno, California, at the time he filed his petition.

Background

Petitioner graduated from Western Kentucky University in 1986. Soon after, he moved to Fresno area and worked for

a restaurant as an assistant manager. In 1987, petitioner moved to Oakland, California, to study in a master's in business administration program with a concentration in taxation at Golden Gate University.

To support himself through school, petitioner worked several part-time jobs, including working as a security guard at an Oakland hosing complex. On October 7, 1988, while petitioner was on night shift with 2 other security guards at the housing complex, assailants entered the security office with high powered rifles and began shooting. One guard was killed and one escaped. Petitioner was shot 15 times in the abdominal area and was taken to the Alameda County Hospital.

After an approximate 3-month stay in the hospital, petitioner was discharged to a convalescent hospital. Initially, petitioner's employer paid for his convalescent care. Soon after, however, petitioner's employer refused to pay for the rehabilitation, and petitioner had to leave the

convalescent hospital.[2]

Petitioner then returned to Fresno to live with his twin brother and his sister-in-law. Petitioner's sister-in-law was a nurse and provided him with medical attention. During his recovery period which extended through November 1989, petitioner did not work.

In November 1989, petitioner's brother and sister-in-law moved to Nigeria. From that point on, petitioner was on his own, and he began to rebuild his life. He decided to return to school and attended Long Beach State University, where he lived in the dormitory. For the fall 1990 term, petitioner changed universities and enrolled at the University of California at Irvine.

Meanwhile, petitioner hired an attorney, Arthur Levy, to secure disability income from the Employment Development Department of the California Department of

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[2] While petitioner was in the hospital, the California Department of Victims of Violent Crime paid petitioner's rent on his Oakland studio apartment. The Department also assisted petitioner in returning to Fresno from the convalescent hospital.

Employment (EDD). Commencing October 7, 1988, the EDD began paying petitioner temporary disability of $133.33 per week. Subsequently, petitioner hired attorney Gary Snyder to pursue other claims. On or about July 17, 1991, petitioner resolved his claims against the California Department of Industrial Relations Uninsured Employer's Fund. Petitioner was awarded temporary disability of $133.33 per week from October 7, 1988 through October 5, 1989, in addition to permanent disability of $133.33 per week from October 12, 1989 through July 17, 1991, subject to certain deductions. Deductions were made for temporary disability previously paid, for moneys paid to the EDD from October 6, 1988, through August 25, 1989, at $133.33 per week, and for Mr. Snyder's attorney fees. Thus on July 17, 1991, petitioner received a final settlement of $8,717.81.

In 1990, Gary Snyder introduced petitioner to attorney Georgia Michell (Ms. Michell). Petitioner hired Ms. Michell to represent him in a personal injury action relating to the

injuries he sustained in the 1988 shooting incident.[3] Petitioner signed a contract agreeing to pay Ms. Michell a fee of 40 percent of the damages award if the case was settled or tried and 45 percent fee if appellate work was required. Ms. Michell, on petitioner's behalf, filed a lawsuit against various defendants including petitioner's employer (the security company) and the managers and owners of the housing complex. Many of the defendants involved were judgment proof. There was, however, an applicable insurance policy issued by Home Insurance Companies (Home Insurance).[4]

In July 1991, Ms. Michell, without petitioner's knowledge or consent, settled the case against the defendants for $250,000, and a check was issued by the Home Insurance to

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[3] A substantial portion of the factual findings at this point is derived from the findings set forth in the unpublished opinion of the Court of Appeal of the State of California, First Appellate District, Division Five, in the case of Osiio v Ganong and Michell et al., said opinion having been filed Apr. 12, 1996

[4] As part of the litigation, petitioner signed a "Plaintiff's Response To Form Interrogatories (set. #1)", which included the following response: "Question 2.6(a) Self-employed tax and management consultant, 4516 East Belmont Avenue, Fresno, California 93702."

the "Trust Account of Ganong & Michell, as Trustees For Wale O. Osijo" in the amount of $250,000 on July 26, 1991. In 1993, petitioner was asked by Ms. Michell to sign a a settlement distribution statement reflecting the following:

Funds received		$250,000.00
Less legal fees		112,500.00
		137,500.00
Cost advanced1	$4,807.10	
To Be Paid		
Department of Industrial Relations Uninsured Employer's Fund		$10,000.00
Balance due client		122,692.90
Interest		8,844.15
Total		131,537.05

1 Details of costs advanced omitted.

Petitioner refused to sign the document and disputes its accuracy. However, petitioner did receive from Ms. Michell a check for $131,537.05 sometime during 1993. Petitioner began to pursue legal remedies against Ms. Michell in California courts for legal malpractice. Part of those measures are still pending. Suffice it to say that, at the time of trial before this Court, it had been held that Ms. Michell

had breached her contract with petitioner and had claimed excessive fees.

Beginning in 1993, several family members and friends came to petitioner to have their 1992 Federal income tax returns prepared by him because they knew petitioner had a strong background in business administration and taxation Petitioner credibly testified that he prepared no more than 10 tax returns in 1993. Petitioner testified that he may have charged as much as $200 per return, but he is not sure whether he collected from everyone the money owed him. In 1994, petitioner prepared between 10 to 15 returns, including one for a friend whom he charged $450.

Discussion

The Commissioner's determination in the notice of deficiency is presumed correct, and petitioner bears the burden of proving otherwise. Rule 142(a); Welch v Helvering, 290 U.S. 111 (1933). Where a taxpayer has not filed a return, respondent may reconstruct a taxpayer's

unreported income. Holland v United States, 348 U.S.121 (1954). The reconstruction of income must be reasonable in light of all of the surrounding facts and circumstances. Giddio v Commissioner, 54 T.C. 1530, 1533 (1970).

For the taxable years 1989 through 1992, we find that petitioner was not engaged in any income producing activity. Respondent's reliance upon an answer to an interrogatory filed in a lawsuit (see supra note 4) is misplaced. While petitioner may identified himself in the answer to an interrogatory as a tax management consultant, calling oneself that does not necessarily indicate that he had in fact engaged in such activity. We also note that the actual interrogatory that petitioner answered was not presented to the Court, and thus we are unaware of the full context of petitioner's answer.

On the other hand, petitioner has satisfactorily established that he was not engaged in income-producing activity during 1989 through 1992. We find that during that

time petitioner was recovering from serious gunshot wounds, attending university and/or pursuing his legal remedies. Petitioner received non taxable income from various agencies of the State of California which he had used to support himself.[5] Accordingly for the years 1989 through 1992, we hold that petitioner did not fail to report income.

For taxable year 1993, respondent determined, inter alia, that petitioner received interest income in the amount of $8,862, of which $18 is interest earned on funds held at Glendale Federal Bank and $8,844 is interest that had accrued on the "settlement" funds held by Ms. Michell. Petitioner concedes the $18 amount, but contests the fact that he received interest income from Ms. Michell. Allegedly, when Ms. Michell received the $250,000 settlement check from Home Insurance, she deposited it in an interest-bearing trust account. The record before us,

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[5] Respondent does not contest the nontaxability of those proceeds

however, does not include any details of the account, including the terms of the trust or in which years and in what amounts said interest was earned.

Petitioner currently is contesting the validity of the settlement Ms. Michell arranged on his behalf. The California Court of Appeals has held that Ms. Michell is entitled to legal fee of $100,000[6], not the $112,500 she retained. Petitioner's claim against Ms. Michell for breach of fiduciary duty remained unresolved.

Respondent has not offered any evidence in support of the determination that petitioner had unreported interest income of $8,844 in 1993. The purported distribution statement was offered by petitioner as part of his presentation of the sequence of events pertaining to his litigation travails. The contents of that document are disputed by petitioner and are pure hearsay. Ms. Michell was not called as a witness to support its contents, and it

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[6] This is 40% of the $250,000 settlement amount.

does not lend persuasive support to respondent's determination. Thus, in view of petitioner's credible denial that he received such interest, we hold that petitioner did not receive any taxable interest income from his attorney or any trust in 1993.

Respondent also determined for the 1993 year that petitioner earned Schedule C income of $3,750 resulting from the preparation of 25 tax returns at $150 per return. We conclude, based upon petitioner's testimony, that petitioner had $2,000 of Schedule C income, resulting from the preparation of 10 tax returns at $200 apiece. Petitioner has failed to present any books and records of his 1993 tax preparation business. Accordingly he has failed to prove which of his clients, if any, failed to pay his fees. In addition, petitioner claims that he had legitimate business expenses to offset that income. However he has failed to substantiate any business expenses. While our conclusion herein resulted in no taxable income for petitioner for 1993 (as petitioner's

income for the year is less than the combined amount of his personal exemption and standard deduction), petitioner will be liable for self employment tax, which shall be determined under Rule 155.

For taxable year 1994, respondent determined that petitioner had interest income of $10, which petitioner does not contest, nonemployee compensation of $2,959, which respondent concedes, and Schedule C self-employment income of $4,050, allegedly fees resulting from the preparation of 25 tax returns, 24 at $150 each and 1 at $450. We conclude that petitioner had 15 clients for whom he prepared income tax returns, 14 at $200 apiece (totaling $2,800) and 1 at $450, resulting in unreported Schedule C self-employment income of $3,250. Again, petitioner has not substantiated that he incurred businesses in deriving his Schedule C income, and we shall not allow any such expenses. While petitioner does not have taxable income for 1994, he has self employment income upon which self-

employment tax is owed, which shall be computed under Rule 155.

Lastly, we consider respondent's determination that petitioner was liable for additions to tax under section 6651(a)(1) for the years 1989 through 1994. In view of our holding that petitioner had no taxable income for the years 1989 through 1992, it follows that there is no underpayment to which a section 6651(a)(1) addition to tax will be applicable. Accordingly, respondent is not sustained on this issue for those years.

For taxable years 1993 and 1994, however, we concluded that petitioner had income from self-employment in the amounts of $2,000 and $3,250 respectively. Section 6107 provides that every individual who has self-employment income of $400 or more shall file a return with respect to self employment tax. Section 1.6017-1(a)(1), Income Tax Regs., provides, in part:

> A return is required under this section if an individual has self-employment income, as

> defined in section 1402(b), even though he may not be required to make a return under section 6012 for purposes of the tax imposed by section 1 or 3 [i.e. income tax]. Provisions applicable to returns under this section. [Emphasis added.]

Petitioner was tax return preparer and should have been aware of these provisions. Moreover, other than indicating that he was busy representing himself in his litigation against Ms. Michell (with substantial travel and research time required) petitioner has offered no excuse for his failure to file returns for 1993 and 1994. He was able to prepare returns for other during this period and could have found the time to prepare his own. Upon due consideration of the entire record, we conclude that petitioner is liable for addition to tax under section 6651(a)(1) for years 1993 and 1994.

Decision will be entered under Rule 155.

ATTEST:

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IN THE COURT OF APPEALS OF THE

STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FIVE

Filed April 12, 1996

WALE O. OSIJO, AO68661

Plaintiff/ Appellant, Contra Costa Superior Court No. C92-05352

v.

GANONG & MICHELL et al,

Defendants/Appellants.

_____/

THE COURT:[1]

Wale O. Osijo (Osijo) brought this malpractice action concerning the representation he received from his former attorney, Georgia Ann Michell-Langsam (Michell, and other attorney defendants. Osijo's malpractice action against Michell resulted from his dissatisfaction with her representation of him in connection with a settlement agreement he signed in previous litigation while he was

[1] Before Peterson, P.J.; King, J.; and Haning, J.

represented by Michell.

The trial court (Hon. James R. Trembath) granted summary judgment against the bulk of Osijo's malpractice claims, but found that Michell had wrongfully misappropriated more than $12,500 in settlement proceeds which should have gone to Osijo. Michell also alleged in an amended cross-complaint that the termination of the initial malpractice claims against her, other than the misappropriation claim entitled her to damages for malicious prosecution. The matter of the cross-complaint and Osijo's remaining claims for breach of fiduciary duty proceeded to trial. The Honorable Barbara Zuniga granted a motion for a judgment against Osijo at the close of his evidence on the claim of breach of fiduciary duty. Also at the time of trial, it was brought to the attention of Judge Zuniga that Osijo had not filed an answer to Michell's amended cross-complaint. The matter of the cross-complaint then proceeded as a default hearing, over appellant's

objections. Judge Zuniga granted a judgment for prior litigation costs of more than $27,000 to Michell as damages for malicious prosecution. Osijo brought an appeal from this judgment; and Ganong and Michell, John F. Ganong (Ganong), and Michell brought a cross-appeal from the trial court's prior ruling that Michell misappropriated more than $12,000 from Osijo's settlement proceeds.

We affirm Judge Trembath's ruling on summary adjudication, that Michell wrongly misappropriated more than $12,000 from Osijo's settlement proceeds. We also affirm his rulings granting summary adjudication against Osijo's other malpractice claims concerning his representation by Michell. We conclude that we must reverse Judge Zuniga's ruling granting a motion for judgment against Osijo's claim for breach of fiduciary duty. We must also vacate the judgment for $27,000 against Osijo as damages for malicious prosecution. The record shows Osijo has already prevailed in part against Michell in this

malpractice action, on the issue of misappropriation of settlement proceeds, although he did not prevail on other factual allegations of malpractice concerning the same settlement. More important, the action was and is still pending. This does not establish there was a previous action which was brought by Osijo without probable cause and which was finally terminated in Michell's favor, as is required for the separate tort of malicious prosecution. We, therefore, remand for further proceedings consistent with the views expressed in this opinion.

I. FACTS AND PROCEDURAL HISTORY

We summarize the relevant facts as briefly as possible. In 1989, Osijo filed a previous action entitled Osijo v Housing Resources Management, Inc. (Super. Ct. Alameda County, No. 649881-6) (personal injury action). In this personal injury action, Osijo alleged that he had been employed as a security guard at the Acorn Apartments, a housing project in Oakland, California when he was shot more than 15 times

in his lower body by assailants armed with high velocity rifles. This attack was carried out by the assailants in retaliation for physical and verbal abuse they suffered at the hands of other security guards earlier in the day. The lawsuit alleged that Osijo's injuries and damages resulted from the negligent failure of the defendants to warn him of the danger. These defendants included Osijo's employer, a security company, and the managers and owners of the housing complex he was guarding.

All the defendants were apparently insolvent or judgment proof. However, there was an applicable insurance policy issued by the Home Insurance Companies (Home), and Home retained the law firm of Larson and Burnham (the Larson firm) to defend Osijo's action.

Osijo had more than one attorney represent him at various times in the personal injury action; eventually in 1990 Michell was retained by him, executing a written retainer agreement. Under the terms of this agreement,

Michell was to be paid 40 percent of any settlement or damages awarded at trial, and 45 percent of any recovery if she was required to defend the damages award on appeal.

The action was eventually settled by Michell, the Larson firm, and Osijo. However, Osijo contended that the settlement was improperly secured. This court (Division Two) affirmed the order of the trial court enforcing the settlement, over Osijo's objections. Under the terms of the settlement, the settling defendant paid $250,000 to Osijo and his counsel, Michell. Michell, however, took for herself 45 percent of the settlement proceeds or $112,500, not the 40 percent or $100,000 authorized by the written agreement for any settlement.

Osijo brought this action against Michell for malpractice, contending she intentionally concealed from him facts relating to the settlement. According to Osijo's theory in the trial court, Michell concealed from him the fact that his damages could be much greater than the settlement amount,

and also that she had an undisclosed conflict of interest as a result of her ties to Home and its retained law firm, the Larson firm, which was by then defending Michell in another malpractice action. Osijo also contended Michell had committed malpractice and violated the terms of the written retainer agreement by taking too much of the settlement proceeds. Michell, in turn, filed a cross-complaint in the same action for malicious prosecution, contending Osijo wrongly sued her for malpractice.

Judge Trembath resolved certain matters on summary judgment or summary adjudication. He ruled Michell had violated the terms of the retainer agreement, because she "wrongfully appropriated" $12,500 too much from the recovery. He also granted summary judgment against Osijo's other claims for malpractice against Michell. Thereafter, Michell amended her cross-complaint to allege that these claims upon which summary judgment were granted had been terminated in her favor, allowing her to

pursue Osijo for malicious prosecution as a result of those claims.

We summarize the final state of Osijo's pleading, as they stood at the time the matter went to trial, since the record before us is in a state of some confusion. Osijo acting in propria persona, had a variety of malpractice claims and related claims of misconduct against his former attorney Michell, all relating to the same settlement. He had contended in this action that Michell's conduct in taking $12,500 from the settlement proceeds constituted a breach of contract and "misappropriation of . . . funds," a claim upon which he prevailed on summary adjudication before Judge Trembath Osijo also contended that the same conduct constituted a breach of fiduciary duty; Judge Trembath did not make a dispositive ruling on this cause of action, which remained for trial.

In earlier pleadings, Osijo had also contended Michell's conduct constituted an undisclosed conflict of interest and

"Antagonism and Refusal to Respect Discharge of Attorney," claims upon which Judge Trembath had granted summary adjudication against Osijo. Osijo had previously complained to the State Bar about Michell's conduct; the State Bar initially declined to investigate and instructed Osijo that he could only force the State Bar to begin an investigation by filing an original petition for such action with our Supreme Court, which Osijo did. Our Supreme Court denied Osijo's petition, but Osijo's efforts did apparently result in further action by the State Bar, which allegedly did later investigate Michell, thereby causing her damages as a result of Osijo's claims, according to Michell's cross-complaint (filed in the same underlying action) for malicious prosecution.

Osijo's remaining claim for breach of fiduciary duty and the cross-complaint filed by Michell against Osijo proceeded to trial before Judge Zuniga. Judge Zuniga granted a motion

for judgment under Code of Civil Procedure[2] section 631.8 at the close of Osijo's evidence. Judge Zuniga also held that Osijo was in default for not filing an amended answer to Michell's amended cross-complaint, and the trial proceeded as a default hearing. Judge Zuniga held Osijo's proceedings were "legally untenable" and awarded costs of defense to Michell for malicious prosecution of $27,729.05.

Osijo filed a timely appeal, and Michell filed a partial appeal from the previous ruling that she wrongly misappropriated $12,500 from Osijo's settlement proceeds. We will discuss certain facts in greater depth later in this opinion, as they become relevant to specific legal issues.

II. DISCUSSION

We affirm the ruling that Michell wrongly appropriated $12,500 in Osijo's settlement proceeds, contrary to the terms of the written retainer agreement. We affirm the summary judgment against Osijo's other claims for legal malpractice.

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[2] Unless otherwise indicated, all subsequent statutory references are to the Code of Civil Procedure.

However, we conclude we must reverse the trial court's ruling granting a motion for judgment under section 631.8 at the close of his evidence. We must also vacate the ruling in Michell's favor for malicious prosecution, because there was no showing she prevailed in this action or that this proceeding was brought without probable cause so as to justify a malicious prosecution award.

A. Wrongfully Appropriated Settlement Proceeds

The written retainer agreement between Michell and Osijo provided that if the matter were settled or resolved at trial, Michell would be entitled to recover 40 percent of the proceeds of the settlement or award. If the award were appealed by the defendants and successfully upheld, Michell would receive 45 percent of the proceeds. The precise wording of the relevant sentence in the fee clause of the written retainer agreement is as follows: "The fee shall consist of 40% of the gross amount of recovery had by way of settlement or judgment and 45% of the gross amount of

recovery if the case is taken to appeal."

Osijo's case was resolved by settlement; and therefore, under the terms of the written retainer agreement, Michell's fees should have been 40 percent, or $100,000, of the $250,000 settlement, not the $112,500 which Michell subtracted from the settlement before turning the remainder over to Osijo. Michell does not contend otherwise, if the terms of the original written retainer agreement are applied.

However, Michell contends the terms of the original retainer agreement were modified by the parties. At some point, Michell threatened to withdraw from the case unless Osijo rehired a worker's compensation attorney, Gary Snyder, whom she had recommended he retain; and in a letter dated August 24, 1990, Osijo offered to pay Michell 45 percent of any recovery if she remained on the case without forcing him to rehire Snyder.

Significantly, Michell did not accept this offer that she would recover 45 percent of any proceeds if she did not

force Osijo to rehire Snyder. By a letter dated September 13, 1990, she apparently rejected this offer: "This letter is to inform you that you must rehire Gary Snyder or I will get out of the case." There is also no other evidence in the record which shows the parties ever agreed on a 45 percent fee.

We apply de novo review to trial court's order granting summary judgment or summary adjudication, independently interpreting the language of the retainer agreement. (See *Perkins v Howard* (1991) 232 Cal.App.4th 708, 712-713.) We find nothing in the retainer agreement or the record which supports Michell's claims that she was entitled to 45% percent of the proceeds of settlement.

Michell implicitly concedes she has no such entitlement under the terms of the written retainer agreement, but she contends she accepted Osijo's later offer of a 45 percent share by her performance, because she did in fact continued to represent Osijo. However, this was something she was already obligated to do by the written terms of the retainer

agreement, which she had previously presented to Osijo for his signature was never modified in writing to increase her fee. The retainer agreement states as follows: "This agreement may be modified by subsequent agreements of the parties only by an instrument in writing signed by both of them or an oral agreement to the extent that the parties carry it out." Here, there is obviously no "instrument in writing signed by both" Michell and Osijo, nor is there any evidence of "oral agreement to the extent that the parties carry it out." Michell rejected Osijo's written offer by a letter in writing. There is no evidence of an "oral agreement" on the new 45 percent fee which Michell and Osijo accepted by performance. The trial court properly granted summary adjudication on this point, finding that Michell's fee under the written retainer agreement was 40 percent, and that she "wrongfully appropriated" the additional $12,500 she subtracted from Osijo's settlement proceeds.

This case is governed by the provisions of Business and

Professions Code, section 6147, which provides in pertinent part: "(a). . . The contract [for legal services] shall be in writing and shall include, but is not limited to, all of the following: [P] (1) A statement of the contingency fee rate that the client and the attorney have agreed upon." These provisions were enacted by the Legislature in order to protect clients and avoid fee disputes by having clear written agreements as to fees. (See *Alderman v Hamilton* (1988) 205 Cal.App.3d 1033, 1036-1038 (*Alderman*).)

Here the original written fee retainer agreement met the requirements of Business and Professions Code section 6147, but the subsequent exchange of letters between Osijo and Michell did not. The original fee agreement also contained restrictions on subsequent modifications which were not satisfied by the subsequent exchange of letters in this case. We agree with the trial court that Michell's attempt to create an entitlement of 45 percent from these sources violated Business and Professions Code section 6147 and the

provisions of the original fee retainer agreement. (See *Alderman, supra,* 205 Cal.App.3d at p. 1037.)

The trial court properly granted summary adjudication on this issue, finding that Michell wrongfully appropriated $12,500 of the settlement proceeds when she attempted to disregard the provisions of the parties' written fee agreement.

B. Osijo's Other Malpractice Claims Against Michell

Judge Trembath granted summary judgment against Osijo's other claims of malpractice. We affirm.

1. Osijo contends Michell had an undisclosed conflict of interest in representing him, because the defense of his personal injury action was under the control of Home., by and through its attorneys, the Larson firm; and Michell herself was insured against malpractice by Home and was defended in a later malpractice action by the Larson firm. We agree these circumstances would reasonably excite suspicion; and in other contexts, very serious question might

be raised about the need for a disclosure to a client of these facts. (See *Jeffry v Ponds* (1977) 67 Cal.App.3d 6, 10-12; *Stanley v Richmond* (1995) 35 Cal.App.4th 1070, 1087-1088 (opn. Of Phelan, J.) (*Stanley*).) However, in the context of the present case, we are limited by the record made below, which shows without contradiction that Osijo's representation by Michell had concluded before she was sued by another party for malpractice and was defended by the Larson firm in that matter. Consequently, the record before us shows Michell would have nothing to disclose to Osijo during the time of her representation of him concerning the Larson firm or any claims made against her Home policy.

Osijo urges that Michell nevertheless had a duty to disclose the fact that her malpractice insurer, Home, was also controlling the defense in Osijo's personal injury litigation. However evidence before us shows Michell did not know that the insurer controlling the defense of Osijo's

personal injury action was Home until this was disclosed in discovery in March 1991, long after she assumed representation of Osijo. Further, we decline on this record to impose a duty upon counsel to disclose to clients the identity of counsel's insurer, where there are presently no claim made or pending against the policy which would create a conflict of interest. No such claim was filed until long after Michell had ceased representing Osijo. Further, the subject matter of Osijo personal injury action had nothing to do with any unasserted claims for malpractice against Michell and our Supreme Court has recently observed that the rules against attorney conflicts of interest are directed to situations in which a link between the subject matters of the two representations or financial ties would give an attorney an incentive to compromise a client's claim at a discount; and we see no such incentive on the facts of records here, prior to assertion of a claim against Michell which might be covered by her Home policy and have some

substantial relationship to Osijo's case. (See *Santa Clara County Counsel Attorneys Association v Woodside* (1994) 7 Cal.App.4th 525, 546-547; *Flatt v Superior Court* (1994) 9 Cal.App.4th 275, 283 (*Flatt*).) Consequently we agree with the trial court that summary judgment on this claim was proper.[3]

2. Summary Judgment Against Other Claims of Malpractice

Osijo also asserted Michell was liable to him on a cause if action which he described as "Antagonism and Refusal to Respect Discharge of Attorney." The trial court properly granted summary judgment against this cause of action based upon the one-year statute of limitations.

The relevant statute of limitation is the one year statute, section 340.6, which requires that such an action against an

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[3] This case would be different if the evidence showed there was an actual conflict between Michell's duty and her own later defense by Home and the Larson firm. We affirm the summary judgment on the narrow ground that the evidence of record does not demonstrate that such an actual conflict existed during the period Michell represented Osijo.

attorney be brought within one year of the date when the plaintiff discovers the facts constituting the wrongful act or omission. The evidence before the trial court showed Osijo did not assert this particular claim within the applicable one-year time period.

Osijo first asserted this cause of action in March 1993. All of the acts complained of, however, occurred during the period of Osijo's representation by Michell, which ended in February 1992; and he was necessarily aware of those facts and the "Antagonism" they caused him at the time they occurred. For instance, Osijo complains that Michell attempted to file an amicus curiae brief in this court (Division Two) in January 1992 which sought to enforce the terms of the settlement agreement he was trying to avoid. We agree with Osijo that the filing of a brief contrary to the interest of a former client raises very serious ethical question; for this reasons, the court refused to accept the brief in question for filing. In any event, Osijo necessarily learned of the attempted filing of the brief at the time it

occurred, since a copy was served on him. For purposes of section 340.6, he knew of the act complained of at the latest in January 1992, but did nothing to bring this cause of action within one year as he was required to do.[4]

Osijo also contends that the trial court also erred in granting summary judgment to Ganong, who he alleged was Michell' law partner. However, no independent acts were alleged, and his liability on these claims could only have been derivative as a result of Michell's actions. Since we affirm summary judgment against Osijo on these claims, the trial court properly entered summary judgment in favor of Ganong as well. Further, it appears Ganong has retired some years previously and played no role in these events.

C. The Motion For Judgment on the Fiduciary Duty Claim

After Osijo presented evidence at the trial court in favor

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[4] We affirm judgment against this cause of action on the basis of statute of limitations, and not on any other ground. It is apparent that if not for the bar of the statute of limitations, very serious question might be raised which would have precluded summary judgment. (See *Flatt*, *supra*, 9 Cal.App.4th at pp. 282-285.)

of his claim for breach of fiduciary duty, Judge Zuniga granted a motion for judgment on this claim under section 631.8. Michell contends we are required to affirm this action granting a judgment under section 631.8 at the close of evidence in a court trial if the judgment is supported by substantial evidence, citing *Rodde v Continental Insurance Co.*, (1979) 89 Cal.App.3d 420, 423-424. However, more recent authority from our Supreme Court makes clear that where, as here, the underlying facts concerning such matters as the appropriation of client funds are no longer subject to dispute, and the only question is the legal one of whether such action constitutes a breach of fiduciary duty, we exercise de novo review. (*Locklin v City of Lafayette* (1994) 7 Cal.App.4th 327, 369-371 (*Locklin*).)

We conclude we must reverse under either standard. Judge Trembath had previously found Michell had "wrongfully appropriated" to herself $12,500 in settlement proceeds which belongs to Osijo. The wrongful

appropriation of client's funds is a clear breach of fiduciary duty owed by an attorney to a client. Judge Zuniga's ruling to the contrary is not supported by substantial evidence and was legally erroneous. (See *Locklin, supra,* 7 Cal.App4th at pp. 369-371).

The misappropriation of client funds held in trust by an attorney clearly constitutes a "breach of trust" in violation of attorney's fiduciary duties. (*Copren v State Bar* (1944) 25 Cal.2d 129, 134-135; *Baca v State Bar* (1990) 52 Cal.App.3d 294, 304-305; see also *Mirabito v Liccardo* (1992) 4 Cal.App.4th 41, 44-46 [Actions by an attorney which violate the rules of professional conduct may also constitute a breach of fiduciary duty.].) Here Michell cashed a settlement check without her client's knowledge or consent, at a time when her right to any fee was still disputed, and used $100,000 for her own immediate purposes. She then later "wrongfully appropriated" an additional $12,500 held in trust for her client, again without her client's knowledge or consent, and

apparently spent the money as well. We are, therefore, astounded by the trial court's ruling that Michell did not violate any fiduciary duty owed to her client. This ruling is simply not supported by substantial evidence, and is legally erroneous. (See *Locklin, supra,* 7 Cal.App.4th at pp. 369-370).

The trial court apparently reached this result because it observed that Osijo had not adduced an expert testimony that an attorney who has "wrongfully appropriated" client funds has breached a fiduciary duty. There is no need for expert testimony, however, as to the obvious proposition. (See *People v Johnson* (1993) 19 Cal.App.4th 778, 789-790.) This is especially true as to a question of law in a trial court, where the trial court is, or should be, already an expert in the law. Expert testimony is not required to show attorney malfeasance where the facts are so clear as to obviate the need for an expert testimony. (*Stanley, supra,* 35 Cal.App.4th at p. 1093 [A judgment for nonsuit based upon the absence of expert testimony regarding attorney duties was reversed.]

accord, *Goebel v Lauderdale* (1989) 214 Cal.App.3d 1502, 1508-1509.)

The judgment in favor of Michell on the cause of action for breach of fiduciary duties must be reversed.

D. Malicious Prosecution

Judge Zuniga also granted judgment for malicious prosecution, finding this action was not legally tenable. However, it is well established that a malicious prosecution action cannot be brought until a previous action has been terminated in favor of the defendant, and Michell obviously has not prevailed in this action, which was and is still pending. In fact it appears Osijo has already prevailed in part in the action, and his other claims on which he did not prevail will not justify damages for malicious prosecution in any event. We, therefore vacate the award of damages for malicious prosecution.

As our Supreme Court has repeatedly observed, it is a "hornbook law" that damages may not be awarded for

malicious prosecution of a prior action, unless the prior action is terminated in favor of the defendant. (See *Babb v Superior Court* (1971) 3 Cal.App.3d 841, 845-847; *Lackner v LaCroix* (1979) 25 Cal.App.3d 747, 749; *Sheldon Appel Co. v Albert & Oliker* (1989) 47 Cal.App.3d 863, 871.) This court (Division Five) has also repeatedly observed that malicious prosecution actions may not be pursued unless the prior action has been favorably terminated. (*Walsh v Bronson* (1988) 200 Cal.App.3d 259, 263-264 (opn. Haning, J.); *Green v Uccelli* (1989) 207 Cal.App.3d 1112, 1121 (*Green*) (opn. King, J.); [Clearly there has been no favorable termination of the underlying. . . action . . . since [an] appeal from the court's judgment is pending before this court."].) Here the malpractice action Osijo brought against Michell has not even terminated; it is still pending; further, Osijo has prevailed in part in this malpractice action.

Judge Zuniga did not find, and could not have found, that this action terminated in favor of Michell. We are

therefore, mystified by the award of damages to Michell for malicious prosecution; there is no legal basis for such an award in any action which is still pending and in which Michell has not prevailed. (See *Jenkins v Pope* (1990) 217 Cal.App.3d 1292, 1297-1301; *Eells v Rosenblum* (1995) 36 Cal.App.4th 1848, 1854 (*Eells*).)[5]

Michell apparently concedes the damages for malicious prosecution could not be based on the fact that Osijo filed certain pleading in an action which is still pending, even though this was the trial court's articulated basis for its

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[5] In light of this legal conclusion, we find it unnecessary to more explicitly address the trial court's conclusion that Osijo was in default for failure to answer Michell's amended cross-complaint for malicious prosecution, although this ruling also appear erroneous. No such cross-complain could properly be filed while the underlying action was still pending; and in fact, Osijo not only answered the first cross-complaint with an answer that he could have been allowed to orally amend so as to apply to the amended cross-complaint, he also prevailed in part in the prior action, which is still pending. The prerequisite for a judgment in Michell's favor for malicious prosecution was, therefor, simply lacking, and the trial court erred in entering judgment against Osijo on this cause of action in any event See *Green, supra*, 207 Cal.App.3d at pp. 1121 [No malicious prosecution action may be brought while the previous action is still pending.]; *Rose v Lawton* (1963) 215 Cal.App.2d 18, 20, 21 [Even after default in the trial court, legal defect in a cause of action as pleaded may be raised on appeal.]; cf. *Paramount General Hospital Co. v Jay* (1989) 213 Cal.App.3d 360, 368-369 [A favorable termination of the severable causes of an action must occur prior to the bringing of a malicious prosecution action.].) Here there is no favorable termination and only a single cause of action for legal malpractice, enunciated on related theories, concerning the same settlement.

damages award on the malicious prosecution action. At oral argument, Michell contended, instead, that the malicious prosecution damages could be based on the fact Osijo filed a complaint with the California Supreme Court regarding Michell, which the Supreme Court declined to hear. Michell now implies that the final disposition of that complaint could be used to uphold the damages award for malicious prosecution. However, the trial court clearly awarded damages for the "initial filings" in this action, which was improper.

Further, Michell had no cognizable damages from the filing of the Supreme Court complaint, as review of the record makes clear. Osijo filed a complaint with the State Bar regarding Michell. The State Bar initially declined to investigate the matter, and told Osijo he would have to file a complaint with our Supreme Court in order to appeal the State Bar's decision not to investigate. Osijo did so. The Supreme Court in its discretion dismissed that complaint,

which did not raise issue of statewide application; but this dismissal, while final, does nit reflect the merits of the dispute so as to allow us to conclude the matter has been favorably terminated or was brought without probable cause. (See *Eells, supra*, 36 Cal.App.4th at pp. 1854-1855.)

Moreover, even if as Michell suggests the filing of that complaint damaged her because it led to a renewed State Bar investigation, it is also well established that the filing of a State Bar complaint by a client does not result in cognizable damages to an attorney, because those damages simply result from the actions of the State Bar acting as an arm of the Supreme court. (See *Stanwyck v Horne* (1983) 146 Cal.App.3d 450, 460-461.) Finally, this is a case in which Osijo prevailed on his claim that Michell, did, in fact, wrongly misappropriated client funds. It would be unjust to award an attorney damages in an action for malicious prosecution brought in such circumstances. The trial court's judgment in Michell's favor for malicious prosecution is

vacated.

III. DISPOSITION

The trial court's adjudication in favor of Osijo regarding wrongful appropriation of settlement proceeds is affirmed. The trial court's order granting summary judgment against Osijo for nondisclosure and "Antagonism" are also affirmed. The trial court's order granting judgment against Osijo on his cause of action for breach of fiduciary duty is reversed. The judgment against Osijo for malicious prosecution is vacated. The matter is remanded for further proceeding consistent with the views expressed in this opinion. Costs on appeal are awarded to Osijo.

ATTEST:

Dated: April 12, 1996

By: /s/ Ron D. Barrow
Clerk of the Court